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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. [redacted] 224

V. V. TANNER, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON; GEORGE H. CRANDALL, PROSECUTING ATTORNEY OF SPOKANE COUNTY, STATE OF WASHINGTON, AND E. W. EVENSON, COUNTY TREASURER OF SPOKANE COUNTY, STATE OF WASHINGTON, APPELLANTS,

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, AND WILLIAM T. OATHOUT, DOING BUSINESS AS RYAN AND OATHOUT, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

FILED AUGUST 10, 1914.

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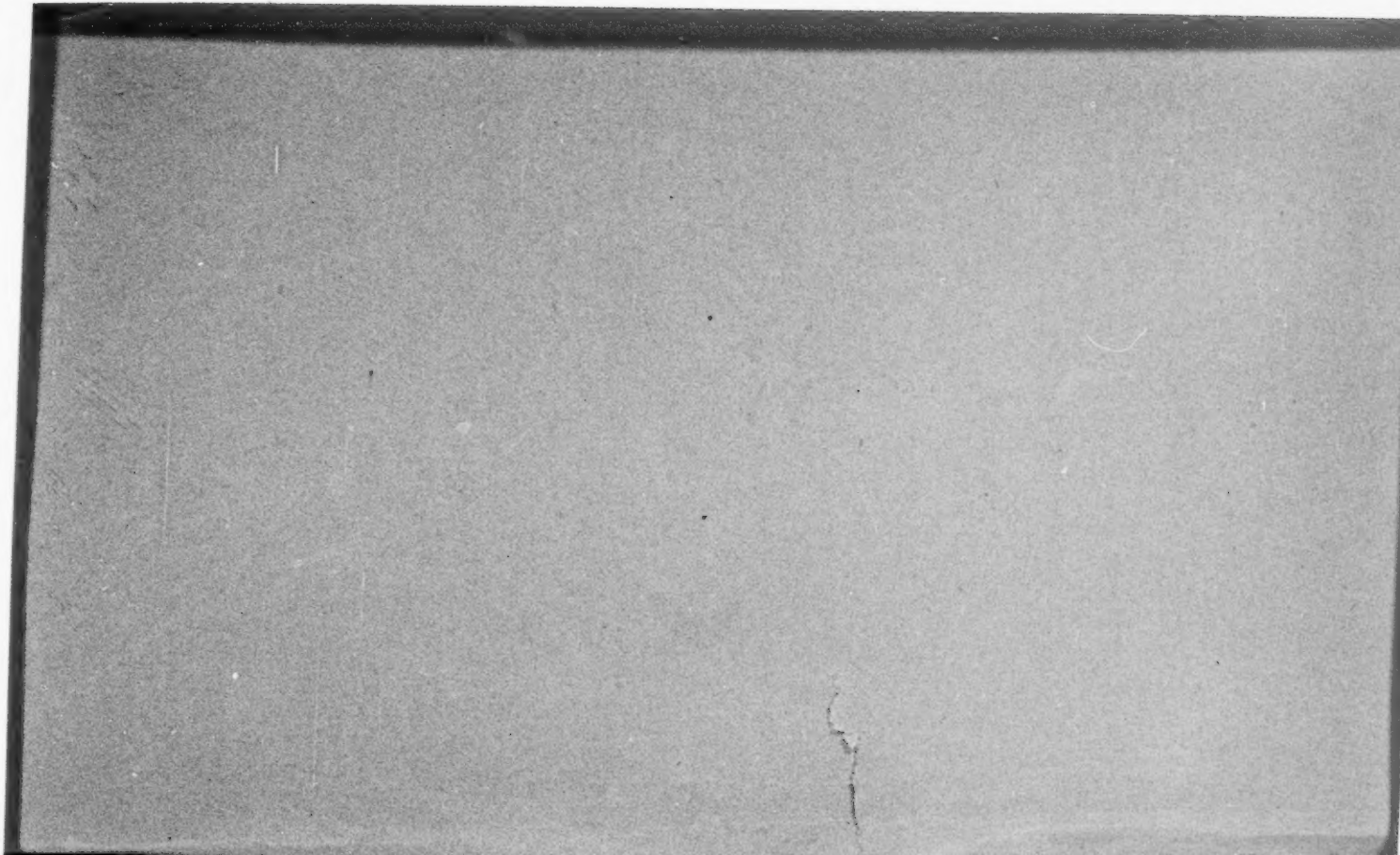
(24,339)



(24,339)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 595.

W. V. TANNER, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON; GEORGE H. CRANDALL, PROSECUTING ATTORNEY OF SPOKANE COUNTY, STATE OF WASHINGTON, AND E. W. EVENSON, COUNTY TREASURER OF SPOKANE COUNTY, STATE OF WASHINGTON, APPELLANTS,

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, AND WILLIAM T. OATHOUT, DOING BUSINESS AS RYAN AND OATHOUT, ET AL.

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1 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Names and Addresses of Solicitors of Record.

For Complainants:

Harry L. Cohn and Rosenhaupt & Grant, Fernwell Building, Spokane, Washington; Hughes, McMicken, Dovell & Ramsey, Seattle, Washington, Stroock & Stroock and Frank T. Wolcott, #2 West 45th Street, New York City, N. Y., Solicitors for Complainants and Appellees, and W. V. Tanner, Attorney General of the State of Washington, Olympia, Washington, and D. V. Halverstadt, 1503-1506 Hoge Building, Seattle, Washington, Solicitors for Defendants and Appellants.

2 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Complainants.
vs.
W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Bill of Complaint.

To the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division:

The complainants above named respectfully show to your Honorable Court:

I.

That the complainants herein named are each and all of them residents and citizens of the city and county of Spokane,
3 State of Washington, and that John T. Little is engaged in the hardware business in said city; that August Stahlberg is engaged in the drug business in said city; that Ryan & Oathout as co-partners, are engaged in the meat business in said city; that Joseph Schaich is engaged in the drug business in said city; that George D. Purves is engaged in the dry goods business in said city; that Harold L. Blake is engaged in the cleaning and dye business in said city; that Adolph Rensch is engaged in the grocery business in said city; that William P. Stone is engaged in the boot and shoe business in said city; that Albert J. Ziv is engaged in the clothing business in said city; that William E. Thompson is engaged in the fuel business in said city; that Abraham H. Goldberg is engaged in the drug business in said city; That Ed Schimmel is engaged in the grocery business in said city; that Marie C. J. Bille is enaged in the grocery business in said city; that Carrie M. Noerenberg is engaged in the dry goods business in said city; that Lena M. Royce is engaged in the photograph business in said city; that the Pearl Laundry Company is engaged in the Laundry business in said city; that Sam Langert and Sidney Kellner co-partners are engaged in the wine business in said city; that Louis K. Lefevre and Elza K. Pearson, as co-partners, are engaged in the drug business in said city.

II.

That complainants suing on behalf of themselves and others similarly situated, bring this Bill of Complaint against W. V. Tanner, the duly elected, qualified and acting Attorney General of the State of Washington, George H. Crandall, the duly elected, qualified and acting Prosecuting Attorney of Spokane County, Washington, E. W. Evenson, the duly elected, qualified and acting Treasurer of Spokane County, Washington.

4 III.

That the value of the matter in dispute herein exceeds the sum of Three Thousand Dollars ($3000.00), exclusive of interest and costs. The jurisdiction of this Honorable Court is invoked because and by reason of the Federal question involved in said suit and equity jurisdiction because complainants have no adequate remedy at law.

IV.

That the aforesaid complainants, and each of them, in carrying on their respective business in said city, have used various systems of advertising, such as circulars, bill-boards, newspapers, electric signs, also the premium advertising system so-called, and that each of the aforesaid complainants are now and have, for various periods of time, ranging from six months to several years, for the purpose of in-

ceasing their general trade and volume of business, and especially to increase their cash trade, adopted and used during the time aforesaid a premium advertising system conducted as follows: with the sale of their goods and merchandise, they each gove to their cash customers stamps, tickets or coupons at the rate of one stamp for each ten cent cash purchase, which said stamps or coupons entitled their said customers, free of charge, to certain other articles of merchandise when presented in certain prescribed numbers for redemption to said complainants or to a third party with whom said complainants have a contract, for the use of their premium advertising system, including the use of their trading stamps or coupons used in connection therewith, and the redemption thereof in merchandise. Many of said complainants having such contracts now in force.

That the said various articles of merchandise consisting of lamps, desks, chairs, tables, book-cases and various other classes of articles for household use, so given in exchange for a prescribed number of said stamps, or coupons, are of sound value and are plainly labeled to show how many stamps or coupons are required to secure each of said articles and are open to inspection by their said customers and the general public at all times during business hours.

Rider No. "I".

That a great many manufacture-s of various lines of merchandise, for the purpose of advertising their business and increasing the volume of their sales, enclose in the packages in which said merchandise is put up for market coupons, tickets, certificates and other premium tokens, among others the following: Swift & Company (soaps), Pacific Coast Borax Company (20-Mule Team Borax), American Tobacco Company, None Such Mincemeat Company, Cleveland Macaroni Company, Runkel & Company (cocoa manufacturers), B. T. Babbett & Company (soaps), Fairbanks & Crescent Manufacturing Company of Seattle (teas, coffees and spices), Grand Union Tea Company, Sealpackerchief Handkerchief Company, Lazell Perfume Company, Corn Products Company (starch), which said coupons, certificates and other premium tokens entitle the customers of complainants purchasing said goods, upon presentation thereof of a prescribed number at the place or places where redeemed, to other articles of merchandise free of charge.

That said complainants have on their shelves on in their stores large quantities of various kinds of merchandise in which the coupons, certificates and premium tokens aforesaid are packed, and which, upon the sale of said merchandise to the said customers, are delivered to them in said packages, which entitle their said customers, upon presentation as aforesaid in the prescribed quantities, to other articles of merchandise free of charge.

V.

That by adopting the said premium advertising system and giving the said trading stamps or coupons to their aforesaid customers, com-

plainants and each of them are enabled to give a discount to small as well as large cash purchasers, one of said coupons or trading stamps being given with each ten cent cash purchase or multiple thereof.

VI.

That by the use of the trading stamps or coupons, as aforesaid, redeemable in merchandise, the customers of said complainants and each of them are enabled to receive and complainants to give
6 a much larger discount than they otherwise could because of the large purchases of the merchandise given in exchange for said stamps, the same are secured at a much less cost than the retail value thereof, and by reason thereof their said customers are much more pleased and satisfied, and said complainants and each of them much more benefited because said articles of merchandise, received as a premium for trading with them and paying cash for merchandise, in the homes of said customers are a continuing advertisement for said complainants.

That the complainants, and each of them, by the use of the afore-

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said premium advertising system, giving to each of their said cash customers the aforesaid trading stamps or coupons, redeemable in merchandise, have been enabled at a moderate cost to themselves to greatly increase their volume of business and their net profits, and especially to greatly increase their cash trade.

VIII.

Complainants further allege that the aforesaid method of advertising and conducting their respective businesses is a lawful one, and not of such a character nor carried on in such a manner as to be prejudicial to the public health, safety, morals or welfare.

IX.

At the last session of the legislature of the State of Washington an Act was passed (being Chapter 134) entitled,

"An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares or merchandise, and providing a penalty for violation thereof, as follows:

Be it Enacted by the Legislature of the State of Washington:

SECTION 1. Every person, firm or corporation, who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle*d* the pur-
7 chaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares or merchandise, free of charge or for less than

the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

SEC. 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in Section 1 of this Act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

SEC. 3. No person, firm, or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town or county in this state other than that in which such furnishing or selling shall take place.

SEC. 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor.

Passed the House March 4, 1913.

Passed the Senate March 12, 1913.

Approved by the Governor March 20, 1913."

That said act passed by the legislature was approved by the Governor March 30, 1913, and takes effect on June 13th, 1913.

X.

Complainants and each of them charge that said act of the legislature is unconstitutional and void for the following reason:

(1) It violates the provisions of the 14th Amendment of the Constitution of the United States in that it deprives the complainants and each of them of liberty and property without
8 due process of law and denies to the complainants and each of them the equal protection of the law. The protection of the provisions of said 14th Amendment of the Constitution of the United States is hereby especially invoked by said complainants and each of them.

Said act is an unwarranted abridgement of those rights and privileges guaranteed to them and each of them by the provisions of said 14th Amendment of said constitution, in that:

(*a*) It deprives the said complainants and each of them
equal protection of the law because not equal and uniform in
eration, in that the complainants and each of them pay city, c
and state taxes the same as other merchants (their compet
engaged in similar lines of business, and using other and v
methods of advertising their business and who are not by pro
of said act required to pay said annual license tax of Six Tho
Dollars ($6000.00).

(*b*) That the classification attempted in said act for the
pose of imposing said annual license tax of Six Thousand D
($6000.00) is arbitrary and discriminating and not based upo
just distinction between merchants engaged in competition in
ilar lines of business.

(*c*) That the said license tax of Six Thousand Dollars ($600
imposed in said act upon said complainants and others simi
situated is not a tax upon their business or occupation but is a
lawful attempt to levy an annual license tax on the method of
ducting their respective businesses, to-wit: their method of a
tising and increasing their cash trade and is violative of the li
and rights guaranteed to them by the aforesaid provisions of
Federal Constitution.

9 (*d*) That said annual license tax of Six Thousand
lars ($6000.00) is unreasonable, arbitrary, oppressive,
criminatory and prohibitory, inasmuch as said charge is far in e
of the amount of tax or license imposed by said state upon any o
legitimate business or other methods of advertising, which do
materially differ from that used by complainants, and becaus
deprives complainants of all profits in carrying on their respe
businesses, and because no similar tax is laid upon other classe
methods of advertising which do not materially differ from
used by complainants.

(*e*) That the amount of said annual license tax, to-wit:
Thousand Dollars ($6000.00) is so excessive, onerous and unr
onable that said complainants and each of them cannot pay
tax, and is so large and excessive as to be plainly apparent on the
of said act that it is prohibitory.

(*f*) That said annual license tax of Six Thousand Dol
($6000.00) is so large, exorbitant and excessive, while under
guise of a revenue measure, will produce no revenue, and is in
a prohibitory measure.

(*g*) It deprives the complainants and each of them of their
erty and property without due process of law inasmuch as they
any of them cannot bestow a gift or give an order on another m
chant for a gift to a customer without paying said onerous, excess
and burdensome tax; that in making a gift to their respective c
tomers in the manner hereinbefore set forth complainants a
each of them were and are exercising a natural right antecedent
and secured by the 14th Amendment to the Constitution of t
United States.

(*h*) That the penalties, fines and imprisonments provided for t
enforcement of said act are so onerous, drastic and excessive as

deter complainants or either of them from violating said
10 act and testing the validity thereof in a court of law.

(*i*) That the fines and penalties imposed by the provisions of said act for its violation are so excessive and exorbitant as to be confiscatory of the property of said complainants and each of them were they or either of them to violate said law, for the purpose of testing the validity of the same in a court of law, and said law held valid.

(*j*) Complainants and each of them further allege that said act is wholly unconstitutional and void, being in contravention of the provisions of Section 10 of Article 1 of the Constitution of the United States providing that no state shall pass any law impairing the obligation of contracts, etc., in that it impairs the obligations of contracts with and the rights of said complainants and each of them to contract with their customers to give said trading stamps with the purchase of merchandise redeemable in merchandise as heretofore given by them. It also impairs the obligations of contracts entered into by said complainants with a third party for the use of their advertising system, including the use of their trading stamps or coupons and the redemption thereof in merchandise. Said third parties being unable to carry out same because said $5000.00 tax also imposed on them and is prohibitive.

(*k*) That said act in its provisions is partial, unreasonable, oppressive, unequal, in restraint of trade and prohibitory of lawful acts done in the conduct of a lawful business, and is therefore violative of the liberty and rights guaranteed to said complainants, and each of them, by the provisions of the aforesaid 14th Amendment to the Constitution of the United States.

(*l*) That the said method of the complainants and each of them, as hereinbefore described, in giving with the sale of merchandise
trading stamps or coupons to their customers, redeemable in
11 merchandise, in no way effects the public health, safety, convenience, comfort, morals or welfare and is therefore not subject to police control or regulation.

(*m*) That the said method of complainants and each of them hereinbefore described, of advertising their business and inducing cash trade is a lawful one and repeatedly has been so held by the Courts of Last Resort in numerous states as well as Federal Courts.

XI.

Complainants further allege that the Prosecuting Attorney of said county, defendant herein, whose duty it is to enforce the provisions of said statute, threatens, as soon as said act takes effect, to enforce the payment of said prohibitive license tax, and threatens to bring numerous criminal prosecutions against said complainants and each of them, as well as civil suits to enforce the payment of said license tax, and said complainants by reason thereof, will be subjected to numerous criminal prosecutions and civil suits if they continue the use of the aforesaid premium advertising system, as hereinbefore described, in violation of the provisions of said act; that said complainants and each of them, if forced to discontinue the

use of the aforesaid described premium advertising system, will suffer great and irreparable damage to their respective businesses, as hereinbefore and hereinafter and fully set forth.

XII.

Complainants further allege that they and each of them, depending and relying upon their business and the method of conducting their business by the use of the aforesaid premium advertising system and the giving of the discount in the manner hereinbefore stated, being a lawful business and method of conducting their said businesses have expended large sums of money in advertising
12 the aforesaid premium advertising discount system, which expenditures would be a total loss to them if not permitted to continue the aforesaid method of advertising their business and giving a discount to their customers by giving of said stamps and coupons to their customers with their purchases of merchandise, as hereinbefore described.

Rider No. "2".

That said complainants have a large investment in stock and merchandise on their shelves and in their respective stores in which are packed coupons, tickets, or other premium tokens which entitle their customers purchasing said goods and receiving said coupons, on presentation thereof in prescribed quantities, at the place or places provided therein for redemption, to receive other articles of merchandise free of charge. That said coupons, certificates, or other premium tokens are so packed in the packages of merchandise that they cannot be removed without practically destroying said packages and the value of the merchandise contained therein, and that if said complainants, or any of them, are deprived of the right to dispose of said merchandise to their said customers with said coupons enclosed, they would thereby lose a large amount of money invested therein and suffer great irreparable injury and loss to their business.

XIII.

That the said complainants and each of them have issued to their customers many of said trading stamps or coupons on the representation that they and each of them would continue to give the same in the future to their cash customers and that as soon as a certain number thereof are accumulated by their said customers they will be able to exchange the same for articles of merchandise of their own selection free of charge; that said complainants and each of them now have outstanding in the hands of their customers large numbers of said trading stamps or coupons which they have secured from complainants as a consideration and discount for cash trade, and that in order to keep faith with their said customers it is necessary that they redeem or cause to be redeemed said stamps and coupons in merchandise in the future from time to time as the necessary and requisite number of the same are presented
13 for redemption.

XIV.

That if said complainants or either of them should fail to carry out the said implied contract with their customers or fail to keep faith with them by redeeming said coupons or trading stamps so given by them and each of them to their said customers, they and each of them would lose many customers and a large amount of trade and suffer great loss and injury to their business by reason thereof.

XV.

That said complainants and each of them, if they should be deprived, even for a short time of the right to continue the use of said premium advertising system by giving said trading stamps or coupons to their cash customers, redeemable in merchandise, with the purchases of merchandise at the stores of said complainants and each of them, and thereby break their implied contract with said customers to continue the giving of said trading stamps or coupons, as aforesaid, and fail to keep faith with their said customers, they and each of them would lose many customers and a large amount of trade and the business of said complainants and each of them would be greatly injured and they and each of them would suffer great and irreparable loss by reason thereof.

Inasmuch as complainants and each of them have no adequate remedy in the premises by the strict rules of common law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are perfectly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can obtain only in a court of equity, they and each of them pray:

1. That W. V. Tanner, as Attorney General of the State
14 of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, Washington, and E. W. Evenson, as County Treasurer of Spokane County, Washington, and all other persons be restrained and enjoined provisionally, preliminarily and perpetually by the order and injunction of this court from bringing, directly or indirectly, any proceeding at law or in equity for the collection of any tax or sum of money imposed under the provisions of Chapter 134 of the Session Laws of the State of Washington for 1913, being entitled "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards or other similar devices for or with the sale of goods, wares and merchandise, and providing a penalty for the violation thereof, said act having been passed by the House March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 30, 1913, and from causing the complainants, or any of their officers, agents, employes or servants from being arrested for violating the terms and provisions of said act and from taking any other action or in any other manner interfering with the complainants or either of them or their respective businesses by reason of said act, and that an order to show cause issue herein upon application of the complainants herein directed to the above named defendants, requiring them

and each of them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the final hearing that the aforesaid act may be declared to be unconstitutional, illegal and void and that a perpetual injunction be issued restraining the enforcement thereof, as hereinabove prayed for.

15 3. That a writ of subpœna may issue to the said defendants and each of them requiring them to answer this Bill of Complainant fully and truthfully, but not on oath, which is waived, and that further and general relief be granted as the nature of complainants' case may require or to equity may seem meet.

(Signed) HARRY ROSENHAUPT,
(Signed) HARRY L. COHN,
(Signed) HARRY ROSENHAUPT,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

John T. Little, being first duly sworn, on oath deposes and says: That he is one of the complainants named in the foregoing Bill of Complaint; that he has read the foregoing Bill of Complaint and knows the contents of same, and the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, as to which matters he believes them to be true; that he makes this verification on behalf of said complainants.

(Signed) JOHN T. LITTLE.

Subscribed and sworn to before me on the 9th day of June, A. D., 1913.

(Signed) TERENCE T. GRANT,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, residing at Spokane.*

16 Endorsements: Bill of Complaint. Filed in the U. S. District Court for the Eastern District of Washington, June 13, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

17 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER et al., Defendants.

Præcipe.

To the Clerk of the above entitled Court:

You will please issue subpœna for said defendants herein.

(Signed) H. L. COHN,
Of Counsel for Complainants.

Endorsements: Præcipe to issue Subpœna in Equity. Filed in the U. S. District Court for the Eastern District of Washington, June 13, 1914. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

18 UNITED STATES OF AMERICA:

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706. In Equity.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER et al., Defendants.

Subpœna in Equity.

The President of the United States of America, Greeting: To George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington:

You are hereby commanded, That you appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Spokane, Washington, within twenty (20) days from the date of service hereof, to answer a Bill of Complaint filed against you in said court by John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, doing business as Ryan & Oathout, Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham I. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noeren-berg, Lena M. Royce, Pearl Laundry Company, a corporation, Charles E. Marr, Sam Langert and Sidney Kellner, co-partners, Louis K. Lefevre and Elza K. Pearson, co-partners, citizens of the State of Washington, and to do and receive what the court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness, the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 13th day of June, 1913.

[SEAL.] W. H. HARE, *Clerk.*
By FRANK C. NASH, *Deputy.*

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to file your answer or other defense to the above mentioned suit 20 days after service, excluding the day thereof at the clerk's office of said court, pursuant to said Bill, otherwise the said Bill will be taken pro confesso.

W. H. HARE, *Clerk.*
By FRANK C. NASH, *Deputy.*

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I hereby certify, that I served the within writ together with a bill of complaint and a temporary restraining order in the within case by delivering to and leaving a true copy thereof with each of the within named George H. Crandall, Prosecuting Attorney Spokane County and E. W. Evenson, County Treasurer Spokane County, on June 13, 1914.

Fees: $10.06.

(Signed) W. A. HALTEMAN,
U. S. Marshal,
By MAX ANDERSON, *Deputy.*

Endorsements: Subpœna in Equity. Filed in U. S. District Court for the Eastern District of Washington, June 16, 1914. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

20 UNITED STATES OF AMERICA:

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706. In Equity.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER et al., Defendants.

Subpœna in Equity.

The President of the United States of America to W. V. Tanner, as Attorney General of the State of Washington, Greeting:

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the city of Spokane, Washington, within twenty (20) days from the date of service hereof, to answer a bill of complaint filed against you in said court by John T. Little, August Stahlberg, Lawrence Ryan and Wm. T. Oathout, doing business as Ryan & Oathout, Jas. Schaich, Geo. D. Purves, Harold L. Blake, Adolph Rensch, Wm. P. Stone, Albert J. Ziv, Wm. E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Mary C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a corporation, Charles E. Marr, Sam Langert and Sidney Kellner, co-partners, Louis K. Lefevre and Elza K. Pearson, co-partners, citizens of the State of Washington, and to do and receive what the court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

21 Witness, the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 13th day of June, 1913.

[SEAL.] W. H. HARE, *Clerk,*
By FRANK C. NASH, *Deputy.*

Memorandum Pursuant to Rule 12, *Supreme Court, U. S.*

You are hereby required, to file your answer or other defense 20 days after service, excluding the day thereof, in the above mentioned suit at the office of the Clerk of said Court, pursuant to said Bill, otherwise the said Bill will be taken pro confesso.

W. H. HARE, *Clerk*,
By FRANK C. NASH, *Deputy*.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I hereby certify, that I served the within writ by delivering to and leaving a true copy thereof with W. V. Tanner, as Attorney General of the State of Washington, on June 16, 1914.

(Signed) JOSEPH R. H. JACOBY,
U. S. Marshal,
By HARRY A. WHITE, *Deputy*.

Endorsements: Subpœna in Equity. Filed in the U. S. District Court for the Eastern District of Washington, July 8, 1912. W. H. Hare, Clerk, by S. M. Russell, Deputy.

22 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Charles E. Marr, Sam Langert and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Motion.

To the Honorable Frank H. Rudkin, Judge of the District Court of the United States within and for the Eastern District of Washington, Northern Division:

The application of John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, doing business as Ryan & Oathout, Joseph Schaich, George D. Purves, Harold L. Blake, Adolph

Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a corporation, Charles E. Marr, Sam Langert and Sidney Kellner, co-partners, Louis K. Lefevre and Elza K. Pearson, co-partners, who show the Honorable Court as —

23 That there has been instituted in the above-entitled court an action by Bill of Complaint against W. V. Tanner as Attorney General of the State of Washington, George H. Crandall as Prosecuting Attorney of Spokane County, Washington, and E. W. Evenson as County Treasurer of Spokane County, Washington, the object and purpose of said action being to secure from this Honorable Court an order that the said defendants, W. V. Tanner as Attorney General of the State of Washington, George H. Crandall as Prosecuting Attorney of Spokane County, Washington, and E. V. Evenson, as County Treasurer of Spokane County, Washington, and all other persons, be restrained and enjoined provisionally, preliminarily and perpetually by the order and injunction of this court from bringing, directly or indirectly, any proceeding at law, or in equity for the collection of any tax or sum of money imposed under the provision of Chapter 134 of the Laws of the State of Washington for 1913 and being

"An Act relating to the use and furnishing of stamps, coupons, "tickets, certificates, cards or other similar device for or with the "sale of goods, wares and merchandise, and providing a penalty for "violation thereof."

said Act having been passed by the house March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 20, 1913, and from causing the complainants, or any of their officers, agents, employees or servants from being arrested for violation of the terms and provisions of said Act and from taking any other action or in any manner interfering with the complainants or either of them or their business by reason of said act, and praying that an order to show cause herein issue upon application of the complainants herein directed to the above named defendants and each of them, requiring them, and each of them, to show cause why a temporary injunction should not issue as prayed for therein and for other equitable relief.

24 Your complainants further show to this Honorable Court that the Act hereinbefore referred to is contrary to the terms, provisions and protection of the Constitution of the United States of America and is therefore void, all as is more fully alleged, set out and explained in the Bill of Complaint herein filed.

That said Act by its terms becomes effective and a law of the state of Washington on June 13, 1913, and the defendants and each of them now threaten to, and will unless enjoined and restrained by this Honorable Court, prosecute the complainants, their officers, agents, employees and servants for violation of its provisions, and in addition thereto institute actions at law for the collection of the license tax therein provided for, all as is more

fully and completely set forth in the Bill of Complaint herein filed, to which reference is hereby made and by such reference said Bill of Complaint is made a part of this application.

By reason thereof and for the further reason that before notice of the time and place for the hearing of said temporary or interlocutory injunction can be heard by this Honorable Court and determined by three Judges in the manner provided by law, the defendants will cause irreparable damage and loss to the complainants, as they now threaten to do, the complainants move the court for an order of this Honorable Court, directed to the defendants and each of them, citing and requiring them to appear before this Honorable Court and such other Judges as this Court shall designate, at a time and place to be fixed by this court according to law, then and there to show cause, if any they have, why a temporary or interlocutory injunction should not issue against them and each of them in the manner hereinbefore stated, and for the reasons hereinbefore outlined, the complainants further move the court that this Honorable Court grant a temporary restraining
25 order remainable in force until the hearing and determination of the application for an interlocutory injunction restraining the defendants and each of them in the manner that an interlocutory injunction is sought.

This motion is based not only upon the Bill of Complaint filed herein but the supporting affidavits filed herewith.

(Signed) COHN & ROSENHAUPT,
Solicitors for Complainants.

26 In the District Court of the United States, Eastern District of Washington, Northern Division.

JOHN T. LITTLE et al., Plaintiffs,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Harry L. Cohn being first duly sworn on oath, deposes and says that on the 4th day of June, 1913, he interviewed George H. Crandall, the duly elected, qualified and acting prosecuting attorney of Spokane County, Washington, that this affiant informed the said Crandall that he represented as attorney a great many merchants in the city of Spokane who in the operation of their business give trading stamps, coupons, tickets, etc., with the sale of goods, whereby the said purchasers were enabled to exchange the same for premiums in the form of merchandise; that this affiant at the same time called to the attention of said Crandall the enactment by the legislature of the State of Washington of a law for an Act relat-

ing to the use and furnishing of stamps, tickets, certificates, cards, or other similar devices for or with the sale of goods, wares and merchandise, and providing a penalty for violation thereof, said Act being known as Chapter 134 of the Session Laws of 1913, passed by the House March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 20, 1913, and inquired of the said Crandall whether he, as prosecuting attor-
27 ney of Spokane County, Washington, would enforce the said law and the said Crandall then and there informed this affiant and authorized him to communicate said information to his several clients so engaged in said business, that as soon as said law became effective, to-wit: June 12, 1913, he would in fact prosecute all persons doing or conducting their business in such manner who should have first failed to procure a license therefor as in said Act provided and would in addition thereto proceed civially against said merchants for the collection of said license tax, and in order that this affiant might explain the attitude, in this respect, of the said prosecuting attorney, to his several clients who are engaged in giving away said trading stamps, coupons, etc., with purchases of goods, so redeemable in merchandise therefor, wrote a letter to this affiant, which letter was and is in words and figures, as follows, to-wit:

SPOKANE, WASH., June 4, 1913.

"Messrs. Cohn, Rosenhaupt & Grant, City.

"GENTLEMEN: In reply to your inquiry regarding the Act, Chap-
"ter 134 of the Session Laws of 1913, which becomes operative the
"12th inst, which act relates to the use and furnishing of stamps,
"coupons, tickets, certificates, cards or other similar devices, for or
"with the sale of goods, wares and merchandise, providing a penalty
"for violation thereof, will say it is the attitude of this office, in all
"cases that are brought to our attention, to prosecute for the viola-
"tion of this act, where merchants furnish coupons described in
"this act without first having obtained their license as is provided,
"and in cases where it may be expedient, start an action for the
"recovery of the license fee described in the act.

"You are at liberty to take this matter up with any parties whom
"you may represent who are interested in the operation of this
"law.

"Yours very truly,

"(Signed) GEO. H. CRANDALL,
"Prosecuting Attorney."

Further affiant saith not.

(Signed) HARRY L. COHN.

28 Subscribed and sworn to before me this 9th day of June, A. D., 1913.

(Signed) TERENCE T. GRANT,
Notary Public, State of Washington, Residing at Spokane.

[NOTARIAL SEAL.]

29 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Albert J. Ziv being first duly sworn, deposes and says that he is one of the complainants herein; that he is engaged in the shoe and clothing business at E. 1914 Sprague Avenue, Spokane, Washington, and has been engaged in said business for more than seven (7) years last past, and that for more than seven (7) years he has in addition to other advertising issued to his purchasers trading stamps, giving to each cash purchaser of ten cents and multiples thereof, stamps which said stamps are redeemable in merchandise for their consideration of cost.

Deponent says that he has invested in his business about the sum of Eight Thousand ($8000.00) Dollars, and has built up a moderately prosperous business largely by aid of said stamps and the advertising he received in connection with the giving away of the same. That many of his customers deal with him in preference to dealing with his competitors in order to secure said stamps and if he were to cease giving the same away, even for a short space of time, he would loose a material proportion of his said business. That his business is ligitimate and that he sells his goods at only a
30 fair margin of profit. That it is an utter and physical impossibility for him to pay six thousand ($6000.00) dollars a year or any sum in that neighborhood for the privilege of continuing to use said trading stamps but that said sum, or any such sum, would be to him ruinous and prohibitory.

(Signed) ALBERT J. ZIV.

Subscribed and sworn to before me this 9th day of June, A. D., 1913.

[NOTARIAL SEAL.] (Signed) TERENCE T. GRANT.
Notary Public in and for the State of Washington, Residing at Spokane.

31 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

George D. Purves being first duly sworn on oath, deposes and says: That he is one of the complainants herein. That he is engaged in the dry goods business at E. 501 5th Avenue, Spokane, Washington, and has been engaged in said business at said place for more than four years last past. That for more than two and one-half years last past he has used in connection with said business a form of advertising known generally as trading stamps, giving to each cash purchaser a coupon or stamp with each multiple of ten cents purchased from him. That said stamps are redeemable in merchandise, free of charge.

Deponent says that he has materially increased his business by the use of said stamps and if he were to discontinue the use of the same he would loose a material proportion of his trade to his irreparable loss.

Deponent says that he has invested in his said business the sum of Three Thousand ($3000.00) Dollars and the total gross income of his business does not exceed the sum of Nine Thousand
32 ($9000.00) Dollars; that on said sum of Nine Thousand ($9000.00) Dollars he does not make a net profit to exceed twenty (20) per cent. thereof and that it is a physical impossibility for him to pay an annual license tax to continue in said trading stamp form of advertising of Six Thousand ($6000.00) per year. That he has represented to his customers that he will continue to give away said trading stamps with cash purchases, and acting on said representations many of his customers have continued to deal with him in preference to his competitors, but if he is unable to continue to give said trading stamps, even for a short space of time, his business will become materially reduced and he will of necessity break faith with his customers and lose many thereof. That said license tax is two-thirds of the amount of his total income and is unreasonable, prohibitory and excessive and it is a physical impossibility to pay the same.

(Signed) GEORGE D. PURVIES.

Subscribed and sworn to before me this 10th day of June, 1913.

[NOTARIAL SEAL.] (Signed) TERENCE T. GRANT,
Notary Public in and for the State of Washington, Residing at Spokane.

33 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Plaintiffs,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Ed. Schimmel being first duly sworn, deposes and says that he is one of the complainants herein, that he is engaged in the grocery business at 1403 Clark Avenue, in the city of Spokane, Washington, and has been engaged in said business at said location for more than six (6) years last past. That for more than one (1) year last past he has used in connection with the advertising of his said business, the premium advertising system of trading stamps, giving to each cash purchaser of goods or merchandise in his said line of business, stamps with each ten cent purchase or multiple thereof, and by reason thereof he has materially increased his business; that said stamps are redeemable in merchandise, and are exchangeable free of charge therefor, that many of his customers deal with him in preference to dealing with his competitors in order to secure said stamps and he has issued many stamps to many customers representing to them that they will be able in the future, and as they deal with him from time to time, to secure other and additional stamps until some required amount is secured which will be exchangeable for some desired com-odity. That if he ceases to give said stamps, even
34 for a short space of time, he will loose much of his trade to his irreparable damage and injury. That he has invested in his business the sum of Twenty-five Hundred ($2500.00) Dollars and has a gross income from his business of about the sum of Eleven or Twelve Thousand ($11,000.00 or $12,000) Dollars, on which he makes a profit of not to exceed twenty per cent. That it is a physical impossibility for him to pay a license tax of Six Thousand ($6000.00) Dollars to continue to use said trading stamp form of advertising but that said sum, as applied to his business, is exorbitant, unreasonable and prohibitory to his using said premium advertising system and the giving away of said stamps.

(Signed) ED SCHIMMEL.

Subscribed and sworn to before me this 9th day of June, 1913.

(Signed) TERENCE T. GRANT,
Notary Public in and for the State
[NOTARIAL SEAL.] *of Washington, Residing at Spokane.*

35 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Lawrence Ryan being first duly sworn on oath, deposes and says that he is one of the complainants herein; that he is engaged in the grocery and butcher business at 601-603 Mansfield Avenue, in the city of Spokane, Spokane County, Washington, and has been in said business for about two years, and for practically all the said period has used in addition to other forms of advertising, premium advertising, or the use of trading stamps or coupons, giving to each cash purchaser at his place of business a stamp or coupon with each cash purchase of 10 cents or multiple of 10 cents and said stamp or coupon being exchangeable for merchandise for the payment of their consideration therefor.

Deponent says that many of his customers, as he is informed and believes, are induced to deal with him at his said place of business instead of dealing with competitors, for the reason that they may secure said stamps or coupons and that if he were to abandon said form of advertising he would loose a large bulk of his trade, and even if he were to discontinue the use of the same for only a short space of time, he would loose a large proportion of his business.

36 Deponent says that he has invested in his business about the sum of Three Thousand ($3000.00) Dollars; that he sells his goods of necessity at a close margin of profit and that his total gross income from the sale of goods is only about the sum of Thirty-six Hundred ($3600.00) Dollars per year, on which deponent makes a net profit of not more than twelve and one-half per cent.

Deponent says that he is informed that on the 12th day of June, 1913, a law becomes effective whereby he is required to pay a license tax of Six Thousand ($6000.00) Dollars per year to continue to use said form of advertising and deponent further says that said sum is materially more that his total profit at his place of business and that for him to pay said license tax would cause him to op-

erate his business at great loss and would plunge him into insolvency. That said amount as a license tax for the purpose of using said system of advertising is unheard of, exorbitant, ruinous and excessive. That in the exchange of said stamps as conducted by deponent for merchandise there is no lottery or chance or gambling device but the said stamps have a certain exchangeable value and act as a discount to cash purchasers of his goods, wares and merchandise.

(Signed) LAWRENCE RYAN.

Subscribed and sworn to before me this 9th day of June, 1913.

(Signed) TERENCE T. GRANT,
Notary Public in and for the State of Washington, Residing at Spokane.

[NOTARIAL SEAL.]

37 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

John T. Little being first duly sworn on oath deposes and says: That he is one of the complainants herein and is engaged in the hardware business at No. 110 Washington Street, Spokane, Washington, and for the last two years has, in addition to other and various forms and methods of advertising, adopted and used what is generally known as the premium or trading stamp advertising system, and that said system consists of the following plan: That this deponent issues to purchasers on purchases made in his said place of business a stamp upon each ten cent or multiple of ten cent purchase within his said store, and for a given number of said stamps there is exchanged to said cash purchaser certain articles of merchandise of sound and substantial value, which is, in fact, intended, and operates as a discount to those buying for cash of this deponent. That owing to the fact that the articles of merchandise thus exchangeable for a given number of said stamps or coupons are in fact given to the customer at their ordinary retail value, this deponent is able to give his customers a much larger discount in the form of merchandise than he could give in the way of a cash discount because of the large purchases of such merchandise
38 so given in exchange for said stamps, the same is procured at much less than the retail value thereof. But in this connec-

tion deponent further says that in giving the said trading stamps with each purchase of ten cents and multiples thereof, he is in no wise increasing the price thereof to the purchaser, so that in receiving the stamps and in exchanging the same for the premiums mentioned the purchaser is receiving an additional consideration for the purchase of the goods, wares and merchandise of this deponent in the first instance.

Deponent says that for more than two years he has continued this form of advertising and that a great many of his customers deal with him depending upon receiving such additional consideration in the way of premiums and in order to accom-odate the increased trade that this form of advertising has brought to him he has expended large sums of money to accom-odate said trade and has invested in his business about the sum of fifteen thousand dollars, and in fact has on hand a stock of merchandise of the value of about ten thousand dollars but if he is unable to carry on his said business by said coupon or trading stamp advertising he will, in his opinion, lose many of his customers.

In addition thereto deponent says that he has issued to customers of his many trading stamps on his representation that he will continue to issue the same in the future and that as soon as a certain number thereof are accumulated by the purchasers, that they will be permitted and enabled to exchange the same for merchandise free from any additional charge and the holders of said coupons or trading stamps have secured the same from this deponent upon the faith of this deponent and upon his representation that he will continue in the future to furnish them with sufficient trading stamps to make up the requisite number which will enable them to secure the goods, wares and merchandise exchangeable therefor.

39 Deponent says that his business is a legal and lawful business; that he sells his goods at the ordinary profit thereon, in competition with similar lines in the city of Spokane, and is actually and in a bona fide way granting a discount or an additional consideration to each of his purchasers by giving to them such coupons or trading stamps exchangeable for the merchandise hereinbefore described.

Deponent further says that it is a physical impossibility for him to continue his business and to at the same time pay an annual license fee of six thousand dollars for the privilege of giving out trading stamps or coupons, but that the payment of such an amount in the way of a license fee for the privilege to so conduct his business would be ruinous, nor could this deponent successfully continue his business and pay such an unreasonable amount, but if the deponent should discontinue to use such form of advertising he will not only break faith with and his representations to his customers, as hereinbefore stated, but will thereby lose a large volume of business on which he has expended large sums of money in order to secure, and which said investment would be lost unto him, and in fact this deponent would suffer irreparable injury and that the same could in no wise be accurately computed.

Deponent further says that if he be forced to discontinue the use

f said premium advertising system and the giving of the trading amps or coupons used in connection therewith redeemable in merhandise, even for a short time, and thereby break faith with his stomers, he would lose their confidence and thereby their trade nd would suffer irreparable loss and injury to his business.

(Signed) JOHN T. LITTLE.

Subscribed and sworn to before me this 9th day of June, 1913.

(Signed) TERENCE T. GRANT,
Notary Public for State of Wash., Residing at Spokane.

[NOTARIAL SEAL.]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

NITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

William E. Thompson being duly sworn on oath, deposes and s: I am proprietor of the Great Eastern Fuel Company doing siness at 129 East Third Avenue, in the city of Spokane, Washgton. I have, and am now using in connection with said busiss, the premium advertising system of trading stamps used in nnection therewith. That I give to each cash purchaser of ds or merchandise in my line of business one of said stamps with h 10 cent purchase or multiple thereof, and that said purchaser entitled upon receiving and collecting a prescribed number of d stamps to receive an article of merchandise at his own selecn, free of cost.

That by the use of said advertising system, including the giving said stamps to purchasers of goods and merchandise, I have atly increased the volume of my business. That I have invested my business about $1500.00.

Deponent further says that he is advised that a law was passed by last Legislature which goes into effect June 12, 1913, requiring the payment of an annual license tax of Six Thousand ($6000.00) Dollars by each and every person giving coupons or trading stamps as a discount to their customers, ch are redeemable in merchandise.

Deponent further says that the amount of such tax is not only rbitant and excessive, but absolutely prohibitive of his using premium advertising system and the giving of said stamps.

(Signed) WILLIAM E. THOMPSON.

Subscribed and sworn to before me this 10th day of June, 1913.
(Signed) TERENCE T. GRANT,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane, Washington.*

42 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Joseph Shaich being first duly sworn on oath deposes and says that he is one of the complainants herein; that he is engaged in the Drug business at Number 526 Main Avenue, Spokane, Washington, and has been established in said business for more than fifteen years last past, and that for more than two and one-half years he has, in addition to the other forms of advertising, used what is commonly known as premium advertising, the plan of which is to give to each cash purchaser of drugs in his place of business a stamp for each purchase of ten cents or multiple thereof, and when the customers shall have received certain numbers of said stamps he is permitted to exchange them for merchandise purchasable with said stamps, the merchandise for which said stamps are exchanged being exchanged for the said stamps for their consideration.

Deponent says that by reason of said form of advertising he has materially increased his volume of trade and that many of his customers expect to receive said stamps and for that reason deal with him in preference to dealing with competitors, of
43 which he has many in said city. Deponent says that he has a stock on hand of between eight and ten thousand ($8,000.00 and $10,000.00) dollars; that notwithstanding the fact that his business has been materially increased by the use of said premium or trading stamp advertising, he does bit a moderate business and with an additional expense to his business of Six Thousand ($6000.00) Dollars a year would be ruinous and would plunge him into insolvency, and would cause the said business to be a loosing business. That he has furnished to many of his customers said premium trading stamps and has represented to them that if they would purchase from him in the future they could secure more of said stamps with which to obtain said premiums, and that if he is unable to carry out said representations, he will be guilty of a breach of faith with his customers and will become discredited

in their opinion and his business materially damaged. That it is a physical impossibility for this deponent to pay Six Thousand ($6000.00) Dollars a year, or any wise near such a sum for the privilege of carrying on said trading stamp advertising, but if he is required to discontinue the same he will suffer great and irreparable damage to his business; that the said sum of Six Thousand ($6000.00) Dollars a year as a tax for continuing said form of advertising is exorbitant, unreasonable, excessive and absolutely prohibits his continuing in the use of said trading stamps.

(Signed) JOSEPH SCHAICH.

Subscribed and sworn to before me this 9th day of June, 1913.

(Signed) TERENCE T. GRANT,

[NOTARIAL SEAL.] *Notary Public in and for the State of Washington. Residing at Spokane.*

44 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Charles E. Marr being duly sworn on oath, deposes and says that he is a resident and citizen of the city of Spokane, State of Washington; that he is engaged in the Grocery and Meat business in said city; that in carrying on his said business he has used various methods of advertising, such as circulars and newspapers, and also adopted and used for about three and a half years the premium advertising system. That the premium advertising system as used by him in advertising his business and especially encouraging cash trade is as follows:

That with the sale of goods, wares and merchandise he issues to purchasers coupons, trading stamps or tickets which entitles the purchaser receiving such coupons or tickets, upon receiving and collecting a certain prescribed number and upon the presentation of said prescribed number by said purchaser, the purchaser receives free of charge certain premiums of goods, wares or merchandise of sound and substantial value, thereby creating a discount to his customers.

Deponent further says that by the use of said coupons, tickets or trading stamps he is enabled to give to small as well as large
5 purchasers a discount in consideration of cash trade, in that said trading stamps are given with every ten cent purchase

or multiple thereof, except a few excluded articles; that by reason of the redemption of said stamps in goods, wares or merchandise of sound and substantial value, he is enabled to give to his customers a much larger discount in the form of merchandise than he could give in the way of cash discount, because of the large purchases of such merchandise so given in exchange for said stamps, the same is procured at much less than the retail value thereof.

Deponent further says that the business that he is engaged in is a lawful business and that this method of premium advertising adopted by him is a lawful one; that in conducting the said system of premium advertising there is no element of lottery, gambling, game or chance of whatsoever kind or character but that the same is a legitimate form of discount to purchasers of goods, wares or merchandise from deponent.

Deponent further says that by the use of said premium advertising system he has been able to largely increase his trade; that his customers have been and are now receiving said coupons, tickets or trading stamps and have been so receiving them for a period upwards of three years; that he has spent large sums of money advertising this premium advertising system so adopted by him and now has invested in said system a large sum of money. That he has outstanding a large amount of th-se coupons in the hands of his customers and in order to keep faith with his customers it is necessary that he redeem said coupons and tickets in the future from time to time as the necessary and requisite amounts of same are secured. That if he is not permitted to continue in the use of same he has no mode or system whereby he may redeem from past purchasers tickets, stamps or coupons that he has furnished to
46 them and on which they have relied when purchasing goods, wares and merchandise from him.

Deponent further says that depending and relying upon being permitted to continue his business in the form of discounts as hereinbefore stated, he has expended large sums of money in order to continue his business in said manner, which expenditures would be a total loss to him if he is not permitted to continue the business of furnishing to his customers such stamps, coupons or tickets.

Deponent further says that by the use of this advertising system aforesaid and the discount given in connection therewith, he has greatly increased the volume of his business and cash trade with his customers.

Deponent further says that if he should be deprived, even for a short time, of the right to continue said premium advertising system and the giving of said discount to his customers, by the use of said trading stamps, thereby breaking an implied contract with his said customers. That if he would discontinue the same or fail in any way to keep faith with them by continuing to give out said stamps at the discount aforesaid, his business would be greatly and irreparably injured; that he would loose a large number of customers and suffer great loss by reason thereof. Deponent further says that the annual license tax of Six Thousand ($6000.00) Dollars

provided by an Act of the Legislature is so exorbitant and excessive as to prohibit his continuing the use of said advertising system.

(Signed) CHARLES E. MARR.

Subscribed and sworn to before me this 9th day of June, 1913.

(Signed) TERENCE T. GRANT,

[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane.*

47 Endorsements: Motion for Temporary Restraining Order and Supporting Affidavits. Filed in the U. S. District Court for the Eastern District of Washington, June 13, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

48 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN AND William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Temporary Restraining Order.

This matter coming on for hearing before the Judge of the above Court on the motion of the above named complainants for an interlocutory injunction enjoining the defendants, and each of them, and all other persons, from bringing directly or indirectly, any proceeding at law or in equity for the collection of any tax or sum of money imposed under the provisions of Chapter 134 of the Session Laws of 1913 of the State of Washington, being

"An Act relating to the use and furnishing of stamps, coupons, "tickets, certificates, cards or other similar device for or with the "sale of goods, wares, and merchandise, and providing a penalty for "violation thereof."

said Act having been passed by the House March 4th, 1913, passed by the Senate March 12th, 1913, and approved by the Governor March 20th, 1913, and from causing the complainants, their officers, agents, servants and employees to be arrested and from taking

any other action or in any other manner interfering with the complainants, or either of them or their business by reason of said law, and that an order to show cause issue herein upon
49 the application of the complainants therein directed to the above named defendants requiring them to show cause why a temporary injunction should not issue as prayed for therein, and it being necessary that notice thereof be given before said application shall be heard or determined, to not only the defendants above named but to the Governor of the State of Washington as well, it is therefore Ordered that the defendants and each of them be and appear before the above named Court in the District Court of the United States, within and for the Eastern District of Washington, Northern Division, sitting at Spokane in said District, on the 28th day of June, A. D. 1913, at the hour of ten o'clock in the forenoon of said day, then and there to show cause if any they have why they and each of them should not be enjoined and restrained in the manner hereinbefore stated. It further appearing to the Court that irreparable loss, damage and mischief will result to the complainants unless a temporary restraining order is granted, it is Ordered that until the hearing of this show cause order and determination thereof, the defendants and each of them, and all other persons, are enjoined and restrained from bringing, directly or indirectly, any proceeding at law or in equity, for the collection of any tax or sum of money imposed under the provisions of Chapter 134 of the Session Laws of the State of Washington for 1913, being

"An Act relating to the use and furnishing of stamps, coupons, "tickets, certificates, cards or other similar device for or with the "sale of goods, wares and merchandise, and providing a penalty "for violation thereof."

said Act having been passed by the House March 4th, 1913, passed by the Senate March 12th, 1913, and approved by the Governor March 20th, 1913, and from causing the complainants or either of them or their officers, agents, servants or employees to be arrested for violation of the provisions of said act, and from taking any
50 other action or in any other manner interfering with complainants or either of them, or any person similarly situated, or their business by reason of said Act, and it is further ordered by the court that a copy of this order be served at least five days before said date of hearing, as hereinbefore stated, upon the Governor and the Attorney General of the State of Washington, as well as the other defendants.

Done in open Court this 12th day of June, 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed order to show cause on the therein-named W. V. Tanner as Attorney

General of the State of Washington, and on Ernest Lister as Governor of the State of Washington, by handing to and leaving a true and correct copy thereof with W. V. Tanner and Ernest Lister, and each of them, at Olympia, Washington, in said District, on the 16th day of June, 1913.

(Signed) JOSEPH R. H. JACOBY,
United States Marshal.
By HARRY A. WHITE, *Deputy.*

Endorsements: Order to Show Cause and Temporary Restrain-Order. Filed in the U. S. District Court for the Eastern District of Washington, June 13, 1914. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

51 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Order.

This matter coming on for hearing upon the application of the complainants herein for an order continuing the Show Cause Order issued herein against the above named defendants and the Temporary Restraining Order in connection therewith, and after hearing said application and being *dully* advised in the premises, it is therefore Ordered that the Show Cause Order and the Temporary Restraining Order therein contained herein issued of date June 12th, 1913, returnable June 28th, 1913, be and the same is hereby continued until the 10th day of July, 1913, and until the hearing of the said show cause order and determination thereof.

Done in open Court this 28th day of June, 1914.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Order Continuing Hearing of Show Cause Order. Filed in the U. S. District Court for the Eastern District of Washington, June 28, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

52 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Plaintiffs,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Amended Bill of Complaint.

To the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division:

The plaintiffs above named respectfully show to your Honorable Court:

I.

That the plaintiffs herein named are each and all of them residents and citizens of and engaged in business in the City and County of Spokane, State of Washington; that John T. Little is engaged in the hardware business; that the amount of investment in his business is fifteen thousand dollars; that he carries a stock of hardware merchandise of the value of ten thousand dollars, and the gross annual income of his business is five thousand dollars; Harold L. Blake is engaged in the cleaning and dye business, the amount invested in his business being five thousand dollars and the
53 gross annual income is three thousand dollars; Ed. Schimmel is engaged in the grocery business and has been for six years; the amount of capital invested in his business is twenty-five hundred dollars and the gross annual income is eleven hundred dollars; that he has on hand merchandise in his store in which are packed coupons redeemable in merchandise, such as soap, canned goods, etc., to the amount of five hundred dollars; August Stahlberg is engaged in the drug business; Ryan & Oathout as copartners are engaged in the meat business; Joseph Schaick is engaged in the drug business; George D. Purves is engaged in the dry goods business; Adolph Rensch is engaged in the grocery business; William P. Stone is engaged in the boot and shoe business; Albert J. Ziv is engaged in the clothing business; William E. Thompson is engaged in the fuel business; Abraham H. Goldberg is engaged in the drug business; Marie C. J. Bille is engaged in the grocery business; Carrie M. Noerenberg is engaged in the dry goods business; Lena M. Royce

is engaged in the photograph business; the Pearl Laundry Company is engaged in the laundry business; Chas. E. Marr is engaged in the grocery business; Sam Langert and Sidney Kellner as copartners are engaged in the wine business; and Louis K. Lefevre and Elza K. Pearson as copartners are engaged in the drug business in said city; that the gross income from the business of each of said plaintiffs will not exceed six thousand dollars ($6,000.) annually, and of many and most of them less than half that amount.

II.

That plaintiffs suing on behalf of themselves and others similarly situated, who have a general interest in the subject of the action, and who constitute a class so numerous as to make it unpracticable to bring them all before the Court, bring this Amended Bill of Complaint against W. V. Tanner, the duly elected, qualified and acting Attorney General of the State of Washington, George
54 H. Crandall, the duly elected, qualified and acting Prosecuting Attorney of Spokane County, Washington, E. W. Evenson, the duly elected, qualified and acting Treasurer of Spokane County, Washington.

III.

That the value of the matter in dispute herein exceeds the sum of Three Thousand Dollars ($3,000.), exclusive of interest and costs.

The jurisdiction of this Honorable Court is invoked because and by reason of the Federal question involved in said suit and equity jurisdiction because plaintiffs have no adequate remedy at law.

IV.

That the aforesaid plaintiffs, and each of them, in carrying on their respective business in said city, have used various systems of advertising, such as circulars, billboards, newspapers, electric signs, also the premium advertising system so-called, and that each of the aforesaid plaintiffs *are* now — and *have,* for various periods of time ranging from six months to several years, for the purpose of increasing their general trade and volume of business, and especially to increase their cash trade, adopted and used during the time aforesaid a premium advertising system conducted as follows: With the sale of their goods and merchandise, they each give to their cash customers stamps, tickets or coupons at the rate of one stamp for each cash purchase of convenient unit amount,—as one stamp for each 5, 10 or 25 cent cash purchase, as the case may be; which said stamps or coupons entitle their said customers to the choice of a certain cash discount, or, free of charge, to certain articles of merchandise of their own selection, when presented in certain prescribed numbers for redemption to such of said plaintiffs as redeem their own coupon stamps or certificates, or to a third party with

whom others of said plaintiffs have a contract, for the use of
55 their premium advertising system, including the use of their trading stamps or coupons used in connection therewith, and the redemption thereof in merchandise. That many of the plaintiffs accept said coupons, at the cash value thereon printed in payment or part payment of the cash retail price of said premium articles.

That the said stamps or coupons are redeemed by plaintiffs in accordance with the terms of printed catalogues or premium lists. Said booklets are distributed free among their customers, and describe the articles which may be secured by the stamps or coupons and the numbers thereof required to obtain same. The delivery of the required number of stamps or coupons, as set forth in said lists, is in full for the article specified, and no money or other consideration is charged therefor.

V.

In the issuing and redemption of said stamps, tickets, coupons or certificates, no element of chance is involved, as the value of each is fixed, both as to cash and merchandise redemption; and the right of every holder is secure. If any particular article or articles upon said lists, or otherwise advertised, is desired by collectors, upon request the said article will be set aside for a reasonable time, ready to be turned over upon presentation of the number of stamps or coupons necessary, according to the terms of said lists or other announcement, for obtainment thereof. Moreover, said various articles of merchandise given in exchange for said stamps or coupons,—as lamps, desks, chairs, tableware, bookcases, toilet articles, smokers' articles, cutlery, stationery, leather goods, pictures, jewelry, musical instruments and various other articles of household, personal and general use,—are of sound value and durable manufacture, and are open to inspection to all during business hours. The aforesaid premiums are not regularly dealt in by many of the plaintiffs, but are used exclusively in connection with said premium adver-
56 tising system.

VI.

That a number of said plaintiffs so using said premium advertising system and giving discounts for cash trade have entered into contracts with third parties, running from one to five years, for the use of their premium advertising system, including their trading stamps used in connection therewith, and for the redemption thereof in merchandise, which said contracts are now in force and were at the time of the passage and going into effect of said act. That a large amount of said trading stamps are now in the hands of said plaintiffs and that, if they are prevented by law from disposing of same, they will suffer great and irreparable loss.

VII.

That a great many manufacturers of various lines of merchandise, for the purpose of advertising their business and increasing the

volume of their sales, enclose in the packages in which said merchandise is put up for market coupons, tickets, certificates and other premium tokens, among others the following: Swift & Company (soaps), Pacific Coast Borax Company (20-Mule Team Borax), None Such Mincemeat Company, Cleveland Macaroni Company, Runkel & Company (cocoa manufacturers), B. T. Babbitt & Company (soaps), Fairbanks & Company (soaps), Townsend Milling Company of Washington (flour), Crescent Manufacturing Company of Seattle (teas, coffees and spices), Grand Union Tea Company, Sealpackerchief Handkerchief Company, Lazell Perfume Company, Corn Products Company (starch), which said coupons, certificates and other premium tokens entitle the customers of plaintiffs purchasing said goods, upon presentation thereof of a prescribed number at the place or places where redeemed, to other articles of merchandise free of charge.

That said plaintiffs have on their shelves or in their stores large quantities of various kinds of merchandise in which the coupons, certificates and premium tokens aforesaid are packed, and which, upon the sale of said merchandise to the said customers, are delivered to them in said packages, which entitle their said customers, upon presentation as aforesaid in the prescribed quantities, to other articles of merchandise free of charge.

57

That such coupons or premium tickets so enclosed in the packages delivered, unbroken, to plaintiffs' customers are also given by various manufacturers of tobaccos and tobacco products, whose wares are extensively dealt in by plaintiffs, including the American Tobacco Company, Liggett & Myers Company, P. Lorrillard Company, Surbrug Company, J. J. Bagley & Company, and Block Brothers; and said coupons and tickets so given are authorized and rendered lawful by section thirty-three hundred and ninety-four of the revised statutes of the United States, as amended by the tenth section of the act of July twenty-fourth, eighteen hundred and ninety-seven, as further amended by the second section of the act of July first, nineteen hundred and two.

VIII.

That by adopting the said premium advertising system and giving the said trading stamps or coupons to their aforesaid customers, plaintiffs and each of them are enabled to give a discount to small as well as large cash purchasers, one of said coupons or trading stamps being given with each 5, 10 or 25 cent cash purchase, or multiple thereof, as the case may be.

IX.

That by the use of said trading stamps and coupons plaintiffs' customers are enabled to receive, and plaintiffs to give, a much larger discount in merchandise than they otherwise could. Because, as a result of the large purchases of the merchandise given in exchange for said coupons or stamps, the articles are secured at much less than the regular retail price. And plaintiffs are materially benefitted be-

cause said articles in the customers' homes are a continuing
58 advertisement for plaintiffs.

That plaintiffs, and each of them, by use of the aforesaid premium advertising system, have been enabled at a moderate cost to greatly increase their business and profits, and especially their cash trade.

X.

Plaintiffs further allege that the aforesaid method of advertising and conducting their respective businesses is a lawful one, and not of such a character nor carried on in such a manner as to be prejudicial to the public health, safety, morals or welfare.

XI.

At the last session of the legislature of the State of Washington an Act was passed (being Chapter 134).

That said act passed by the legislature was approved by the Governor March 30, 1913, and takes effect on June 13th, 1913.

XII.

Plaintiffs and each of them charge that said act of the legislature is unconstitutional and void for the following reasons:

(1) It violates the provisions of the 14th Amendment of the Constitution of the United States in that it deprives the plaintiffs and each of them of liberty and property without due process of law and denies to the plaintiffs and each of them the equal protection of the law. The protection of the provisions of said 14th Amendment of the Constitution of the United States is hereby especially invoked by said plaintiffs and each of them.

Said act is an unwarranted abridgment of those rights and privileges guaranteed to them and each of them by the provisions of said 14th Amendment of said Constitution, in that:

59 (*a*) It deprives the said plaintiffs and each of them of the equal protection of the law because not equal and uniform in its operation, in that the plaintiffs and each of them pay city, county and state taxes the same as other merchants (their competitors) engaged in similar lines of business, and using other and various methods of advertising their businesses and who are not by provision of said act required to pay said annual license tax of Six Thousand Dollars ($6000.00).

(*b*) That the classification attempted in said act for the purpose of imposing said annual license tax of Six Thousand Dollars ($6000.00) is arbitrary and discriminating and not based upon any just distinction between merchants engaged in competition in similar lines of business.

(*c*) That the said annual license tax of Six Thousand Dollars ($6000.00) imposed in said act upon said plaintiffs and others so similarly situated is not a tax upon their businesses or occupations but is an unlawful attempt to levy an annual license tax on a mere

incident of said businesses, and is an unwarranted interference with the method and manner of conducting the same.

(*d*) That said annual license tax of Six Thousand Dollars ($6000.00) is unreasonable, arbitrary, oppressive, discriminatory and prohibitory, inasmuch as said charge is far in excess of the amount of tax or license imposed by said state upon any other legitimate business or other methods of advertising, which do not materially differ from that used by said plaintiffs, and because it deprives plaintiffs of all profits in carrying on their respective businesses, and because no similar tax is laid upon other classes or methods of advertising which do not materially differ from that used by plaintiffs, and because no similar tax is imposed upon other forms of discounts for cash purchases.

(*e*) Said annual license tax of six thousand dollars is
60 prohibitive in that it imposes fina-cial obligation upon plaintiffs for an incident of their respective businesses which is not productive of revenue, and which tax is in excess of the profits from said feature of said business, and is prohibitive of plaintiffs conducting business in connection with said stamps or coupons.

(*f*) That said annual license tax of Six Thousand Dollars ($6000.00) is so large, exorbitant and excessive, while under the guise of a revenue measure, will produce no revenue, and is in fact a prohibitory measure.

(*g*) It deprives the plaintiffs and each of them of their liberty and property without due process of law inasmuch as they or any of them cannot bestow a gift or give an order on another merchant for a gift to a customer without paying said onerous, excessive and burdensome tax; that in making a gift to their respective customers in the manner hereinbefore set forth plaintiffs and each of them were and are exercising a natural right antecedent to and secured by the 14th Amendment to the Constitution of the United States.

(*h*) That the penalties, fines and imprisonments provided for the enforcement of said act are so onerous, drastic and excessive as to deter plaintiffs or either of them from violating said act and testing the validity thereof in a court of law.

(*i*) That the fines and penalties imposed by the provisions of said act for its violation are so excessive and exorbitant as to be confiscatory of the property of said plaintiffs and each of them were they or either or them to violate said law, for the purpose of testing the validity of the same in a court of law, and said law held valid.

(*j*) Plaintiffs and each of them further allege that said act is wholly unconstitutional and void, being in contravention of the provisions of Section 10 of Article 1 of the Constitution of
61 the United States providing that no state shall pass any law impairing the obligations of contracts, etc., in that it impairs the obligations of contracts with and the rights of said plaintiffs and each of them to contract with their customers to give said trading stamps and coupons with the purchase of merchandise redeemable in merchandise as heretofore given by them. It also impairs the obligations of contracts entered into by said plaintiffs with a third party for the use of their advertising system,

including the use of their trading stamps or coupons and the redemption thereof in merchandise.

(*k*) That said act in its provisions is partial, unreasonable, oppressive, unequal, in restraint of trade and prohibitory of lawful acts done in the conduct of a lawful business, and is therefore violative of the liberty and rights guaranteed to said plaintiffs, and each of them, by the provisions of the aforesaid 14th Amendment to the Constitution of the United States.

(*l*) Said act is unconstitutional and void in that it conflicts with and nullifies section thirty-three hundred and ninety-four of the revised statutes of the United States, as amended by the tenth section of the Act of July twenty-fourth, eighteen hundred and ninety-seven, as further amended by the second section of the Act of July first, nineteen hundred and two, which said statute was enacted as a means of carrying into execution the powers vested in the federal government by Section Eighth of Article First of the Constitution of the United States.

(*m*) That the said method of the plaintiffs and each of them, as hereinbefore described, in giving with the sale of merchandise trading stamps or coupons to their customers, redeemable in merchandise, in no way affects the public health, safety, convenience, comfort, morals or welfare and is therefore not subject to police control or regulation.

(*n*) That the said method of plaintiffs and each of them
62 hereinbefore described, of advertising their business and inducing cash trade is a lawful one and repeatedly has been so held by the Courts of Last Resort in numerous states as well as Federal Court.

(*o*) That said statute is criminal, its violation being punishable by maximum penalty of both imprisonment for one year and one thousand dollars fine; that the crime which it attempts to create is the furnishing of stamps or similar devices entitling the holder, upon production of any number, to any goods, wares or merchandise free of charge "or for less than the retail market price thereof"; that said retail market price is incapable of ascertainment, as many if not all of said premium articles have no definite or fixed retail market price; nor any retail market price fixed by plaintiffs themselves, as said articles are not dealt in at retail by many of the plaintiffs, but are used exclusively in connection with said premium system; and said statute is, therefore, void for indefiniteness and uncertainty.

(*p*) That the ascertainment, at the time of dealing with each and every premium article, of the retail market price thereof, even if any such there should be, would be so difficult and burdensome as to be in effect prohibitive of the conducting of said premium advertising system at all, and said act is void therefor.

(*q*) That said statute attempts to prescribe the price at which plaintiffs may sell at retail to a certain class of customers their own goods, wares and merchandise of every kind, nature and description, and is accordingly violative of the immunities granted by the

Constitution of the United States, and particularly the fourteenth amendment thereof.

XIII.

63 Plaintiffs further allege that the Prosecuting Attorney of said county, defendant herein, whose duty it is to enforce the provisions of said statute, threatens, as soon as said act takes effect, to enforce the payment of said prohibitive license tax, and threatens to bring numerous criminal prosecutions against said plaintiffs and each of them, as well as civil suits to enforce the payment of said license tax, and said plaintiffs, by reason thereof, will be subjected to numerous criminal prosecutions and civil suits if they continue the use of the aforesaid premium advertising system, as hereinbefore described, in violation of the provisions of said act; that said plaintiffs, and each of them, if forced to discontinue the use of the aforesaid described premium advertising system, will suffer great and irreparable damage to their respective businesses, as hereinbefore and hereinafter more fully set forth.

XIV.

Plaintiffs further allege that they and each of them, depending and relying upon their business and the method of conducting their business by the use of the aforesaid premium advertising system and the giving of the discount in the manner hereinbefore stated, being a lawful business and method of conducting their said business, have expended large sums of money in advertising the aforesaid premium advertising discount system, which expenditures would be a total loss to them if not permitted to continue the aforesaid method of advertising their business and giving a discount to their customers by giving of said stamps and coupons to their customers with their purchases of merchandise, as hereinbefore described.

That said plaintiffs have a large investment in stock and merchandise on their shelves and in their respective stores in which are packed coupons, tickets, or other premium tokens which entitle their customers purchasing said goods and receiving said coupons, on presentation thereof in prescribed quantities, at the place or places provided therein for redemption, to receive other ar-
64 ticles of merchandise free of charge. That said coupons, certificates, or other premium tokens are so packed in the packages of merchandise that they cannot be removed without practically destroying said packages and the value of the merchandise contained therein, and that if said plaintiffs, or any of them, are deprived of the rights to dispose of said merchandise to their said customers with said coupons enclosed, they would thereby lose a large amount of money invested therein and suffer great irreparable injury and loss to their business.

XV.

That the said plaintiffs and each of them have issued to their customers many of said trading stamps or coupons on the repre-

sentation that they and each of them would continue to give the same in the future to their cash customers and that as soon as a certain number thereof are accumulated by their said customers they will be able to exchange the same for articles of merchandise of their own selection free of charge; that said plaintiffs and each of them now have outstanding in the hands of their customers large numbers of said trading stamps or coupons which they have secured from plaintiffs as a consideration and discount for cash trade, and that in order to keep faith with their said customers it is necessary that they redeem or cause to be redeemed said stamps and coupons in merchandise in the future from time to time as the necessary and requisite number of the same are presented for redemption.

XVI.

That if said plaintiffs or either of them should fail to carry out the said implied contract with their customers or fail to keep faith with them by redeeming said coupons or trading stamps so given by them and each of them to their said customers, they and each of them would lose many customers and a large amount of trade and suffer great loss and injury to their business by
65 reason thereof.

XVII.

That said plaintiffs and each of them, if they should be deprived, even for a short time, of the right to continue the use of said premium advertising system by giving said trading stamps or coupons to their cash customers, redeemable in merchandise, with the purchases of merchandise at the stores of said plaintiffs and each of them, and thereby break their implied contract with said customers to continue the giving of said trading stamps or coupons, as aforesaid, and fail to keep faith with their said customers, they and each of them would lose many customers and a large amount of trade, and the business of said plaintiffs and each of them would be greatly injured and they and each of them would suffer great and irreparable loss by reason thereof.

Inasmuch as plaintiffs and each of them have no adequate remedy in the premises by the strict rules of common law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are properly cognizable and relievable, and to the end that they and each of them may have relief which they and each of them can obtain only in a court of equity, they and each of them pray:

1. That W. V. Tanner, as Attorney General of the State of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, Washington, and E. W. Evenson, as County Treasurer of Spokane County, Washington, and all other persons be restrained and enjoined provisionally, preliminarily and perpetually by the order and injunction of this court from bringing, directly or indirectly, any proceedings at law or in equity for the collection of

any tax or sum of money imposed under the provisions of Chapter 134 of the Session Laws of the State of Washington for 1913, being entitled "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards or other similar devices for or with the sale of goods, wares and merchandise, and providing a penalty for the violation thereof," said act having been passed by the House March 4th, 1913, passed by the Senate March 12th, 1913, and approved by the Governor March 30, 1910, and from causing the plaintiffs, or any of their officers, agents, employes or servants from being arrested for violating the terms and provisions of said act and from taking any other action or in any other manner interfering with the plaintiffs or either of them or their respective businesses by reason of said act, and that an order to show cause issue herein, upon application of the plaintiffs herein, directed to the above named defendants, requiring them and each of them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the final hearing the aforesaid act may be declared to be unconstitutional, illegal and void and that a perpetual injunction be issued restraining the enforcement thereof, as hereinabove prayed for.

3. That a writ of subpœna may issue to the said defendants and each of them requiring them to answer this Amended Bill of Complaint fully and truthfully, but not on oath, which is waived, and that further and general relief be granted as the nature of plaintiffs' case may require or to equity may seem meet.

(Signed) HARRY L. COHN,
(Signed) HARRY ROSENHAUPT,
Solicitors for Plaintiffs.

HUGHES, McMICKEN, DOVELL, & RAMSEY,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

John T. Little, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs named in the foregoing Amended Bill of Complaint; that he has read the foregoing Amended Bill of Complaint and knows the contents of same, and the same is true as to his own knowledge, except as to matters therein stated to be alleged on information and belief, as to which matters he believes them to be true; that he makes this verification on behalf of said plaintiffs.

(Signed) JOHN T. LITTLE.

Subscribed and sworn to before me on the 7th day of July, A. D. 1913.

[NOTARIAL SEAL.] (Signed) TERENCE T. GRANT,
Notary Public in and for the State of Washington, Residing at Spokane.

Endorsed: Amended Complaint. Filed in the U. S. District Court for the Eastern District of Washington, July 7, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

68 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit of Adolph Rensch.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Adolph Rensch being first duly sworn on oath deposes and says that he is engaged in the Grocery business in the city of Spokane, Washington, and in addition to the grocery busines he has for sale, and has had for many months last past, that certain brand of smoking tobacco known as "Union Leader."

Affiant says that the article above named contains inserts, tags or coupons, and a certain number of said tags, inserts or coupons obtained by the purchaser thereof entitles him to certain premiums therefor; affiant says that this article is in frequent demand and is kept in stock in considerable quantities, and on the 12th day of June, 1913, this affiant had on hand a considerable quantity of said commodity. Affiant further says that while he has built up a secure and more or less large trade in this tobacco, the profits he has made, and which he will make in the future thereon, is far less than the sum of Six Thousand ($6000.00) Dollars or any material portion of said sum.

Affiant further says that said stamps, tags or inserts are placed within the package by the original manufacturer thereof and
69 in order to remove the same it is necessary for affiant to break the original packages in which these goods are received and absolutely necessary to obliterate and remove the revenue stamps thereon and affiant further says that according to his belief, based upon his experience of many years last past, it would be difficult and possibly impossible to sell said commodities if they were broken open and the insert removed.

Further affiant sayeth not.

(Signed) ADOLPH RENSCH.

Subscribed and sworn to before me this 7th day of July, 1913.

[NOTARIAL SEAL.] (Signed) TERENCE T. GRANT,
Notary Public in and for the State of Washington, Residing at Spokane.

Endorsements: Affidavit of Adolph Rensch. Filed in the U. S. District Court for the Eastern District of Washington, July 8, 1913. W. H. Hare, Clerk. By S. M. Russell, Deputy.

70 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit of Chas. E. Marr.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

Charles E. Marr being first duly sworn on oath deposes and says that he is engaged in the grocery business in the city of Spokane, Washington, and in addition to the grocery business he has for sale, and has had for many months last past, that certain brand of smoking tobacco known as "Union Leader," and *that* certain brand- of chewing tobacco known as "Horseshoe" and "Star."

Affiant says that each of the different articles above named contain- inserts, tags or coupons and a certain number of said tags, inserts or coupons obtained by the purchaser thereof entitle him to certain premiums therefor; affiant says that these goods are in frequent demand and are kept in stock in considerable quantities, and on the 12th day of June, 1913, this affiant had on hand a considerable quantity of each of said commodities.

Affiant further says that while he has built up a secure and more or less large trade in each of the tobaccos, and chewing tobacco above enumerated, the profit that he has made, and which he will make in the future thereon, is far less than the sum of Six Thousand ($6000.-

00) Dollars, or any material portion of said sum.

71 Affiant further says that said stamps, tags or inserts are placed within the packages by the original manufacturer thereof and in order to remove the same it is necessary for affiant to break the original packages in which these goods are received and absolutely necessary to obliterate and remove the revenue stamps thereon and affiant further says that according to his belief, based upon his busines- experience of many years past, it would be difficult and possibly impossible to sell said commodities if they were broken open and the insert removed.

Further affiant sayeth not.

(Signed) CHARLES E. MARR.

Subscribed and sworn to before me this 7th day of July, 1913.

[NOTARIAL SEAL.] (Signed) TERENCE T. GRANT,
Notary Public for the State of Washington, Residing at Spokane.

Endorsements: Affidavit of Charles E. Marr. Filed in the U. S. District Court for the Eastern District of Washington, July 8, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

72 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Affidavit of Abraham H. Goldberg.

UNITED STATES OF AMERICA,
State of Washington, County of Spokane, ss:

H. Goldberg being first duly sworn on oath deposes and says that he is engaged in the drug business in the city of Spokane, Washington, and in addition to the drug business, he has for sale, and has had for many months last past, those certain brands of cigarettes known as "Fatima" and "Turkish Trophy" and that certain brand of smoking tobacco known as "Duke's Mixture."

Affiant says that each of the different articles above named contain- inserts, tags or coupons and a certain number of said tags, inserts or coupons obtained by the purchaser thereof entitle- him to certain premiums therefor; affiant says that these goods are in frequent demand and are kept in stock in considerable quantities, and on the 13th day of June, 1913, this affiant had on hand a certain quantity of each of said commodities.

Affiant further says that while he has built up a secure and more or less large trade in each of the cigareettes and tobacco above enumerated, the profit that he has made, and which he will make in the future thereon, is far less than the sum of Six Thou-
73 sand ($6000.00) Dollars, or any material portion of said sum.

Affiant further says that said stamps, tags or inserts are placed within the packages by the original manufacturer thereof and in order to remove the same it is necessary for affiant to break the original packages in which these goods are received and absolutely necessary to obliterate and remove the revenue stamps thereon and affiant further says that according to his belief, based upon his business experience of ma-y years past, it would be difficult and

possibly impossible to sell said commodities if they were broken open and the insert removed.

Further affiant saith not.

(Signed) H. GOLDBERG.

Subscribed and sworn to before me this 7th day of July, 1913.

(Signed) TERENCE T. GRANT,

[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Re-iding at Spokane.*

Endorsements: Affidavit of H. Goldberg. Filed in the U. S. District Court for the Eastern District of Washington, July 8, 1913. W. H. Hare, Clerk. By S. M. Russell, Deputy.

74 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George Purvies, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry, Company, a Corporation; Chas. E. Marr, Sam Lengert and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Præcipe for Appearance.

To the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division:

Please enter the separate appearance of George H. Crandall, as prosecuting Attorney of Spokane County, State of Washington, as defendant, and W. V. Tanner, Attorney General, and J. T. S. Lyle, Assistant Attorney General of the State of Washington, as his solicitor- specially, and for the sole purpose of objecting to the jurisdiction of this court to compel the defendant to appear and answer, because the amended bill of complaint is exhibited against said defendant George H. Crandall as, and only as, the prosecuting attorney of Spokane County, State of Washington, to re-
75 strain him by injunction from enforcing or testing the validity of the criminal laws of the State of Washington so as to constitute a suit against the state of Washington in violation of the eleventh amendment of the Constitution of the United States,

and without submitting to or acknowledging the jurisdiction of said court over said defendant, and for no other purpose, a motion to quash all proceedings herein as to this defendant is filed herewith.

(Signed) GEORGE H. CRANDALL,
(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
Solicitors for Said Defendant.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Præcipe for Appearance. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

76 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George Purvies, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation, Chas. E. Marr, Sam Langert and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Præcipe for Appearance.

To the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division:

Please enter the separate appearance of W. V. Tanner as Attorney General of the State of Washington, as defendant, and W. V. Tanner, Attorney General, and J. T. S. Lyle, Assistant Attorney General of the State of Washington, as his solicitor specially, and for the sole purpose of objecting to the jurisdiction of this court to compel the defendant to appear and answer, because the amended bill of complaint is exhibited against said defendant W. V. Tanner as, and only as, the Attorney General of the State of Wash-
77 ington, to restrain him by injunction from enforcing or testing the validity of the criminal laws of the State of Washington so as to constitute a suit against the State of Washington in violation of the eleventh amendment to the Constitution of the United States, and further, because said defendant is not a resi-

dent of the district in which the suit is brought, and without submitting to or acknowledging the jurisdiction of said court over said defendant, and for no other purpose, a motion to quash all proceedings herein as to this defendant is filed herewith.

(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
Solicitors for said Defendant.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Præcipe for Appearance. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

78 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN & WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout, et al., Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Appearance.

To the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division:

Please enter the appearance of E. W. Evenson, county treasurer of Spokane County, State of Washington, in the above cause, and W. V. Tanner, attorney general, J. T. S. Lyle, assistant attorney general, and George H. Crandall, prosecuting attorney of Spokane county, as his solicitors.

(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
(Signed) GEORGE H. CRANDALL,
Solicitors for said Defendants.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Appearance of defendant E. W. Evenson. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

79 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purvies, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pear- Laundry Company, a Corporation; Charles E. Marr, Sam Langert and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington, George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Motion to Quash.

And now comes the defendant W. V. Tanner, as Attorney General of the State of Washington, appearing specially for the purpose herein set forth and no other and responding to the order to show cause heretofore issued herein, but in no way submitting to or acknowledging the jurisdiction of the District Court of the United States, pleads his exemption to be sued in this federal court and prays to be dismissed hence with his reasonable costs in his behalf incurred, for the reason and upon the grounds as follows:

That the amended bill exhibited by the plaintiffs in this cause is directed against the defendant as, and solely as, Attorney General of the State of Washington, and seeks to restrain him by

80 injunction from enforcing the criminal laws of the state of Washington and more particularly an Act of the Legislature of the State of Washington known as Chapter 134 of the laws of 1913; that said Chapter 134 of the laws of 1913 has never been set aside or declared null and void by any court of competent jurisdiction and is now a valid law on the statute books of the state of Washington; that no special duties are imposed upon the Attorney General by said Chapter 134, Laws of 1913, and plaintiffs, by said amended bill, seek to enjoin the defendant from exercising the duties imposed upon him by the constitution and the general laws of the state of Washington defining his duties as Attorney General; that said suit is brought against said defendant solely because of his official capacity as Attorney General of the State of Washington and is therefore a suit against the state of Washington and in violation of the eleventh amendment of the constitution of the United States; that the state of Washington has not consented to be sued in any of the District Courts of the United States; and

defendant especially invokes the protection of the eleventh amendment of the constitution of the United States.

(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
Solicitors for said Defendants.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Motion of defendant, E. V. Tanner, to Quash. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

81 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purvies, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pear- Laundry Company, a Corporation, Charles E. Marr. Sam Langert and Sidney Kellner, co-partners; Louis K. Lefevre and Elza K. Pearson, Copartners, Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Motion to Quash.

Comes now the defendant George H. Crandall Prosecuting Attorney of Spokane County, State of Washington, appearing specially for the purpose herein set forth and no other and responding to the order to show cause heretofore issued herein, but in no way submitting to or acknowledging the jurisdiction of the District Court of the United States, and pleads his exemption to be sued in this Federal Court and prays to be dismissed hence with his reasonable costs in his behalf incurred, for the reasons and upon the grounds as follows:

That the amended bill exhibited by the plaintiffs in this cause is directed against the defendant as, and solely as, Prose-
82 cuting Attorney of Spokane, State of Washington, and seeks to restrain him by injunction from enforcing the criminal laws of the State of Washington, and more particularly an act of the legislature of the State of Washington known as Chapter 134 of the Laws of 1913; that said Chapter 134 of the Laws of

1913 has never been set aside or declared null and void by any court of competent jurisdiction and is now a valid law on the statute books of the state of Washington; that no special duties are imposed upon the said Prosecuting Attorney by said Chapter 134, Laws of 1913, and plaintiff by said amended bill, seek to enjoin the defendant from exercising the duties imposed upon him by the constitution and the general laws of the state of Washington defining his duties as Prosecuting Attorney; that said suit is brought against said defendant solely because of his official capacity as Prosecuting Attorney of Spokane County, State of Washington, and is thereby a suit against the State of Washington and in violation of the eleventh amendment of the constitution of the United States; that the state of Washington has not consented to be sued in any of the District Courts of the United States; and defendant especially invokes the prorection of the eleventh amendment of the constitution of the United States.

(Signed) GEORGE H. CRANDALL,
(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
Solicitors for said Defendant.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Motion of defendant, George H. Crandall, to Quash. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

83 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purvies, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pear- Laundry Company, a Corporation; Charles E. Marr, Sam Langert and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Complainants.

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Motion to Dismiss.

Comes now W. V. Tanner, as Attorney General of the State of Washington, one of the defendants above named and without waiving

the special appearance heretofore made herein, but still insisting that the court is without jurisdiction over him and appearing separately and for none of the other defendants herein, moves to dismiss the amended bill of complaint filed herein for the reason and upon the grounds that as appears upon the face thereof:

1. That there is a misjoinder of parties plaintiff.
2. There is a misjoinder of parties defendant.
3. That several cause- of action have been improperly united.

84 4. That said amended bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs.

5. That plaintiffs have a plain and adequate remedy at law.
6. That this court has no jurisdiction over the person of this defendant or the subject matter of the action.

(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
Solicitors for said Defendant.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Motion of defendant, H. V. Tanner, to dismiss Amended Bill of Complaint. Filed in the U. S. District Court for the Eastern District of Washington, July 16, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

85 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout, et al., Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington, George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Motion to Dismiss.

Comes now George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, one of the defendants above named and without waiving the special appearance heretofore made herein, but still insisting that the court is without jurisdiction over him and appearing separately and for none of the other defendants herein, moves to dismiss the amended bill filed herein for the reason and upon the grounds that as appears upon the face thereof.

1. That there is a misjoinder of parties plaintiff.
2. There is a misjoinder of parties defendant.
3. That several causes of action have been improperly united.
4. That said amended bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs.

86 5. That plaintiffs have a plain and adequate remedy at law.

6. That this court has no jurisdiction over the person of this defendant or the subject matter of the action.

(Signed) GEORGE H. CRANDALL,
(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
Solicitors for said Defendant.

(Signed) D. V. HALVERSTADT,
Of Counsel

Endorsements: Motion of defendant, George H. Crandall, to Dismiss Amended Bill of Complaint. Filed in the U. S. District Court for the Eastern District of Washington, July 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

87 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout, et al., Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Motion to Dismiss.

Comes now E. W. Evenson, as County Treasurer of Spokane County, State of Washington, one of the defendants above named, and appearing separately and for none of the other defendants herein, moves to dismiss the amended bill of complaint filed herein, for the reasons and upon the grounds that as appears upon the face thereof:

1. There is a misjoinder of parties plaintiff.
2. There is a misjoinder of parties defendant.
3. That several cause- of action have been improperly united.
4. That said amended bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs.

5. That plaintiffs have a plain and adequate remedy at law.

88 6. That this court has no jurisdiction over the person of this defendant or the subject matter of this action.

(Signed) W. V. TANNER,
(Signed) J. T. S. LYLE,
(Signed) GEORGE H. CRANDALL,
Solicitors for said Defendant.

(Signed) D. V. HALVERSTADT,
Of Counsel.

Endorsements: Motion of Defendant, E. W. Evenson, to Dismiss Amended Bill of Complaint. Filed in the U. S. District Court for the Eastern District of Washington, July 10th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

89 In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaick, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Charles E Marr, Sam Langert and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Plaintiffs.

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Defendants.

Opinion.

Cohn & Rosenhaupt, Hughes, McMicken, Dovell & Ramsey, Stroock & Stroock and Frank T. Wolcott, solicitors for plaintiffs.

W. V. Tanner, J. T. S. Lyle, Asst. Attorney General, A. V. Halverstadt, solicitors for defendants.

Before Gilbert, Circuit Judge; Wolverton and Rudkin, District Judges.

RUDKIN, *District Judge:*

The Act of the Legislature of the state of Washington, approved March 20, 1913, entitled, "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares and merchandise, and providing a penalty for violation thereof," provides and declares as follows:

"SECTION 1. Every person, firm or corporation, who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares, or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said
90 stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishings or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

"SEC. 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor, which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm or corporation making such payment a license to furnish, sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in Section 1 of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

"SEC. 3. No person, firm or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards or other similar devices for use in any town or county in this state other than that in which such furnishing or selling shall take place.

"SEC. 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

Laws of 1913, c. 134.

"Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both."

Remington & Ballinger's Annotated Codes and Statutes of Washington, section 2267.

The plaintiffs are retail merchants residing in the city of Spokane, and use in their several lines of business stamps, coupons, tickets, certificates and other devices which entitle the purchasers of goods, wares or merchandise, to procure from the vendor, or from some

other person, firm or corporation, goods, wares or merchandise free of cost, as a premium or discount on the amount of their cash purchases. Such methods are now very commonly resorted to by merchants for the purpose of advertising and increasing the volume of their business. The nature of the different devices used, and the manner of their redemption, is not material here, as they
91 are all admittedly controlled by the same general principles of law. The present suit was instituted to restrain the Attorney General of the state, the Prosecuting Attorney of Spokane county, and the County Treasurer of Spokane county from enforcing the provisions of the above act as against the plaintiffs and all other persons similarly situated. The jurisdiction of this court is invoked on the ground that the act is violative of the Constitution of the United States and particularly of the Fourteenth Amendment, in that it deprives the plaintiffs of their property without due process of law, and denies to them the equal protection of the law. Equity jurisdiction is invoked to avoid a multiplicity of suits and to prevent irreparable loss and injury to the business and property of the plaintiffs. The defendants appeared specially and interposed a motion to quash on the ground that this is in effect a suit against the state and the court is therefore without jurisdiction, followed later by a motion to dismiss on the grounds, (1) that there is a misjoinder of parties plaintiff; (2) that there is a misjoinder of parties defendant; (3) that several causes of action have been improperly united; (4) that the amended bill of complaint does not state facts sufficient to warrant the court in granting any relief whatever to the plaintiffs; (5) that the plaintiffs have a plain, speedy and adequate remedy at law; and (6) that the court has no jurisdiction over the persons of the defendants or the subject-matter of the action.

1. The motion to quash and the sixth ground of the motion to dismiss are based on the assumption that this is a suit against the state. But assuming for the present that the act is violative of the Constitution of the United States, this assumption has no foundation in law. The Supreme Court of the United States had repeatedly held that a suit against state officers to restrain the enforcement or execution of a state statute which violates the Constitution of the United States is not a suit against the state, within the intent
92 and meaning of the Eleventh Amendment.

Ex Parte Young, 209 U. S., 123, 159, and cases there cited.

In the Young case the court said:

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes in conflict with the superior authority of that

constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual act. The state has no power to impart to him any immunity from responsibility to the Supreme authority of the United States."

2. The objection to the joinder of the plaintiffs and the uniting of the several causes of action, is apparently based on the theory that each plaintiff has a separate, distinct and independent cause of action against the defendants and that the several plaintiffs may not join in the same suit or unite their several causes of action in the same bill. Equity Rule 38 provides as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

This case would seem to fall within the spirit and equity of that rule.

3. What is meant by a misjoinder of parties defendant is not apparent. If there is any objection on that score it would seem to be on the ground that no cause of action is stated against some of the defendants and this much has been suggested in behalf of the Attorney General of the state. It is made the duty of the Attorney General:

"(1) To appear for and represent the state before the Supreme Court in all cases in which the state is interested; * * * (4) to consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judg-
93 ment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution."

Remington and Ballinger's Annotated Codes and Statutes of Washington, Section 112.

"The prosecuting attorney of each county shall have authority, and it shall be his duty, subject to the supervisory control and direction of the Attorney General, to appear for and represent the state and the county of which he is prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county is a party."

Id., section 116.

Under these statutory provisions the Attorney General of the state is so far charged with the enforcement and administration of the criminal laws as to make him a proper, though perhaps not a necessary party to a proceeding of this kind.

That the prosecuting attorney is charged with the enforcement of the criminal laws of the state is self evident. Indeed, this is his principal duty. Furthermore it appears from the correspondence and affidavits on file that that officer has threatened to enforce the provisions of the act in question against these plaintiffs in Spokane county unless they take out a license or cease the use of so-called trading stamps or other similar devices.

It does not appear that the County Treasurer is charged with any duty in connection with the enforcement of this act except to receive and receipt for monies voluntarily paid to him. Why he should be enjoined from so doing is not entirely clear to us, but these questions do not go to the merits of the controversy and will be considered on the final hearing.

4. The remaining grounds of the motion to dismiss, namely, that the bill does not state facts sufficient to entitle the plaintiffs to the relief sought, and that they have a plain, speedy and adequate remedy at law, may be considered together. It is no doubt true as a general rule that a court of equity has no jurisdiction to enjoin criminal proceedings, but there are well recognized exceptions to that rule. As said by the court in Dobbins v. Los Angeles, 195
94 U. S., 223, 241:

"It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

See also, Ex Parte Young, supra.

We are of opinion that this case falls within the exception to the general rule. While in form this is a suit to enjoin the enforcement of a criminal statute it is in legal effect a suit to enjoin the exaction of an illegal license fee or the imposition of an illegal tax. And:

"It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S., 207, 218.

When we consider the real object of this suit, the vast numbers affected by it, the severity of the penalties imposed, the unauthorized interference with legitimate business methods, and that goods now in original packages containing stamps and other devices are rendered practically valueless, the case seems to call peculiarly for the intervention of a court of equity. The motion to quash and the motion to dismiss are accordingly overruled.

5. The only remaining question in the case is the validity of the legislative act under consideration. The court is fully satisfied from a bare inspection of the act without more and without considering the affidavits on file, that it is and was intended to be prohibitive of the business methods against which it is directed. It is plainly manifest that no merchant could afford to pay the sum of $6000 annually for the mere privilege of giving away trading stamps or allowing discounts on his cash sales. But if this were the only objection to the act it may be that the courts would be powerless to enjoin its execution. The power of taxation rests upon
95 necessity and is inherent in every independent state. It is as extensive as the range of subjects over which the govern-

ment extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy.

Postal Telegraph Co. v. Charleston, 153 U. S., 699.
McCray v. United States, 195 U. S., 27.
Kehrer v. Stewart, 197 U. S., 60.

There is one limitation upon the power of the states in this regard, however, aside from the implied limitation that they may not tax the property or instrumentalities of the Federal Government, and that is the declaration of the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction ' equal protection of the laws. In speaking of this provision in Missouri v. Lewis, 121 U. S., 22, 31, the court said:

"The Fourteenth Amendment, in declaring that no state 'Shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the distribution of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

It may be urged that the state may classify the subjects of taxation, but in the language of Mr. Justice Harlan in Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 560:

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

* * * But arbitrary selection can never be justified by
96 calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a clas-

sification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not an arbitrary selection.'" Citing:

Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U. S., 150.
Cotting v. Kansas City Stock Yards Co., 183 U. S., 79.

Is there any just basis for the classification here attempted? We discover none. The legality of what is generally known as the trading stamp business has been very generally affirmed by the courts. See:

State v. Shugart, 138 Ala., 86.
Ex Parte Drexel, 147 Cal., 763.
Hewin v. Atlanta, 121 Ga., 723.
Commonwealth v. Sisson, 178 Mass., 578.
Long v. State, 74 Md., 565.
State v. Ramsayer, 73 N. H., 31.
City of Winston v. Beeson, 135 N. C., 271.
State v. Dodge, 76 Vt., 197.
Young v. Commonwealth, 101 Va., 853.
State v. Dalton, 22 R. I., 77.
People v. Gillson, 109 N. Y., 389.

as well as in numerous federal cases. But inasmuch as the Supreme Court of the state of Washington has declared that an act prohibiting the use of trading stamps is in violation of the constitution of that state we accept its decision as final and conclusive here.

Leonard v. Basindale, 46 Wash., 301.

The use of trading stamps and similar devices is neither more nor less than a legitimate system of advertising, and those who employ that system are entitled to the protection of the constitution of the United States. As well might the legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling, who do not so advertise. The attempted classification is purely arbitrary, is a manifest attempt on the part of the legislature
97 to accomplish by indirection what the Supreme Court of the state has declared it cannot accomplish directly, and is in violation of the equality clause of the Federal Constitution. What we have here said is limited to merchants using trading stamps in connection with their business, for such are the only parties before the court.

Let the interlocutory injunction issue as prayed.

Endorsed: Opinion. Filed in the U. S. District Court, Eastern District of Washington, July 24, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

98 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER et al., Defendants.

Order Granting Injunction Pendente Lite.

This cause came on to be heard and was argued by counsel before the Honorable W. B. Gilbert, United States Circuit Judge, Honorable Charles E. Wolverton and the Honorable Frank H. Rudkin, United States District Judges, at the City of Portland, Oregon, and thereupon upon consideration thereof it was ordered as follows:

That the defendants, and each of them and all other persons are enjoined and restrained from bringing directly or indirectly any proceeding at law or in equity for the collection of any tax or sum of money imposed under the provisions of Chapter 134 of the Session Laws of the State of Washington, for 1913, being "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards or other similar device for or with the sale of goods, wares and merchandise, and providing a penalty there*of*," said Act having been passed by the House March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 20, 1913, and from causing the complainants, or either or any of them, or their officers, agents, servants, or employes, or any one interested similarly as the said complainants or either or any of them, or their solicitors, agents, servants, or employes to be arrested

99 for violation of the provisions of said Act and from taking any other action or in any other manner interfering with complainants or either of them, or any other person similarly situated, or their business, by reason of said Act.

Done in open court this 29th day of July, 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Order Granting Injunction Pendente Lite. Filed in the U. S. District Court for the Eastern District of Washington, July 29, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

100 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,
vs.
W. V. TANNER et al., Defendants.

Order for Decree pro Confesso.

The subpœna in the above-entitled cause having been returned, which return was duly filed, and it appearing therefrom that the said subpœna was duly served on the defendants herein, and each of them, and the said W. V. Tanner, as Attorney General of the State of Washington, one of the defendants herein, appeared and objected to the jurisdiction of the court to compel him to appear and answer, and moreover moved to dismiss said bill, and the said George H. Crandall, as Prosecuting Attorney of Spokane County, State of Washington, appeared and moved that said bill be dismissed, and the said E. W. Evenson, as County Treasurer of said Spokane County, appeared and moved the court to dismiss said bill; and whereas said motions and each of them were duly heard, and they and each of them were denied more than five days heretofore, and each of said defendants in open court this day having announced that he elected to stand upon his motions to said amended bill and that he refused to plead further;

Therefore, on motion of the solicitors for complainants, it is ordered and decreed that the bill be taken as confessed as
101 to said defendants and each of them.

Dated October 6, 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Order for Decree Pro Confesso. Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

102 In the District Court of the United States, within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Decree.

It appearing to the court that the bill in the above cause was filed in this court on the 13th day of June, A. D., 1913, and that subpœna was duly issued and served on the defendants herein and each of them, and that the said defendants and each of them appeared and moved to dismiss said amended bill, which said motions and each of them were denied, and said defendants and each of them thereupon announcing that they and each of them elected to stand upon their said motions and refused to plead further, and that an order taking the bill as confessed was duly entered in the order book on the 6th day of October, 1913, in the office of the Clerk of this court, and no proceeding has been taken by the defendants, or either of them, since the entry of said order, and the said defendants and each of them, by their solicitors, waiv-

103 ing further time and consenting that a final decree may be entered without the lapse of further time, not consenting, however, to the form or substance of said decree;

It is now, on motion of the solicitors for the complainants herein, ordered, adjudged and decreed that the defendants, and each of them and all other persons, are forever enjoined and restrained from bringing, directly or indirectly, any proceeding at law or in equity for the collection of any tax or sum of money imposed under the provisions of Chapter 134 of the Session Laws of the State of Washington for 1913, being "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares, and merchandise, and providing a penalty for violation thereof," the said Act having been passed by the House March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 20, 1913, and from

causing the complainants, or either or any of them, or their officers, agents, servants or employes, or any one interested similarly as the said complainants, or either or any of them, or their officer-, agents, servants or employes, to be arrested for violation of the provisions of said Act, and from taking any other action or in any other manner interfering with complainants, or either of them, or any other person similarly situated, or their business, by reason of said Act.

Done in open Court this 6th day of October, 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Decree. Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

104 In the District Court of the United States, within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purvies, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Assignment of Errors.

Now comes W. V. Tanner, as Attorney General of the State of Washington, George H. Crandall as Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, as County Treasurer of Spokane County, State of Washington, and make and file this their Assignment of Errors:

I.

The District Court of the United States for the Eastern District of Washington, erred in denying the motion of W. V. Tanner as Attorney General of the State of Washington, to dismiss the Bill of Complaint and Amended Bill of Complaint herein.

II.

The District Court of the United States for the Eastern District of Washington, erred in denying the motion of the appellant,
105 George H. Crandall as Prosecuting Attorney of Spokane County, State of Washington, to dismiss the bill of complaint and amended bill of complaint herein.

III.

The District Court of the United States for the Eastern District of Washington, erred in denying the motion of the appellant, E. W. Evenson as County Treasurer of Spokane County, State of Washington, to dismiss the bill of complaint and amended bill of complaint herein.

IV.

The District Court of the United States for the Eastern District of Washington, erred in entering an order for a decree pro confesso herein, upon the appellants above named, announcing that they stood on their several motions to dismiss and declining to plead further.

V.

The District Court of the United States for the Eastern District of Washington, erred in perpetually enjoining and restraining the appellants above named from bringing directly or indirectly any proceeding at law or in equity for the collection of any tax, or any sum of money imposed under the provisions of Chapter 134, of the Session Laws of the State of Washington for 1913, being "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares, and merchandise, and providing a penalty for violation thereof", and said Act having been passed by the House March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 20, 1913, and from causing the appelle-s, or eother or any of them, or their officers, agents, servants or employes, or any one interest- similarly as the said appelle-s, or either or any
106 of them, or their officers, agents, servants or employes, to be arrested for violation of the provisions of said Act, and from taking any other action or in any other manner interfering with complainants, or either of them, or any other person similarly situated, or their business, by reason of said Act.

VI.

The District Court of the United States for the Eastern District of Washington, erred in not dismissing the bill of complaint herein.

VII.

The District Court of the United States for the Eastern District of Washington, erred in not dismissing the amended bill of complaint herein.

VIII.

The District Court of the United States for the Eastern District of Washington erred in holding said Act of the State of Washington above mentioned to be in contravention of the Fourteenth Amendment to the Constitution of the United States.

IX.

The District Court of the United States for the Eastern District of Washington erred in holding said Act above mentioned to be — contravention of Section 3, Article I, of the Constitution of the State of Washington, wherefore appellants pray that said decree be reversed and will ever pray.

(Signed) W. V. TANNER,
(Signed) D. V. HALVERSTADT,
Solicitors for Appellants.

Endorsements: Assignment of Errors. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk, By Frank C. Nash, Deputy.

107 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Petition for Allowance of Appeal.

The above named appellants, W. V. Tanner as Attorney General of the State of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, as County Treasurer of Spokane County, State of Washington, deeming themselves aggrieved by the judgment and decree of the United States District Court, rendered on the 6th day of October, 1913, perpetually enjoining and restraining the defendants above named from enforcing Chapter 134 of the Session Laws of the

State of Washington for 1913, being "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device for, or with the sale of goods, wares and merchandise and providing a penalty for violation thereof", the said Act having been passed by the House March 4, 1913, by the
108 Senate March 12, 1913, and approved by the Governor March 20, 1913, and from causing the appellees above named, or any of them, or their officers, agents, servants or employes, or any one interest- similarly as the said appelle-s or any of them, or their officers, agents, servants, or employes to be arrested for violation of the provisions of said Act, and from taking any other action, or in any other manner interfering with appellees or any of them, or any other person similarly situated, or their business by reason of said Act, and from bringing directly or indirectly any proceeding at law or in equity, for the collection of any tax or any sum of money imposed under the provisions of said Chapter, and by the orders of said District Court theretofore made in said cause, denying the several motions of said appellants to dismiss the bill of complaint and amended bill of complaint, do hereby appeal from said decree of said United States District Court to the Supreme Court of the United States.

The matter in controversy in said action and on this appeal exceeds the sum of $3000.00, exclusive of interest and costs. This cause is one in which an appeal exists as a matter of right to the Supreme Court of the United States.

Wherefore, the said appellants pray that an appeal be allowed them in the above-entitled cause, and that a transcript of the record and proceedings in said cause with all things concerning the same be sent to the Supreme Court of the United States, in order that the errors complained of in the Assignment of errors herein filed by the said appellants may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Signed) W. V. TANNER,
As Attorney General of the State of Washington.
(Signed) GEORGE H. CRANDALL,
Prosecuting Attorney of Spokane County, State of Washington.
109 (Signed) E. W. EVENSON,
County Treasurer of Spokane County, State of Washington.
(Signed) W. V. TANNER,
(Signed) D. V. HALVERSTADT,
Solicitors for Appellants.

Endorsements: Petition for Allowance of Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

110 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Order Allowing Appeal.

It is hereby ordered that the appeal prayed for by the above named appellants in the above entitled cause to the Supreme Court of the United States, be, and the same hereby is allowed as prayed.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Endorsements: Order Allowing Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

111 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Order Fixing Amount of Bond on Appeal.

On reading the petition of the above named appellants in the above entitled cause for the allowance of an appeal to the Supreme Court of the United States from the judgment and decree of the District Court of the United States for the Eastern District of Washington, rendered therein,

It is ordered that the appellants above named, execute and file in the office of the clerk of the above-entitled court a bond on appeal, conditioned according to law, in the sum of $250.00, with good and sufficient surety to be approved by the undersigned.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Endorsements: Order Fixing Amount of Bond on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

112 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, Geroge D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Appeal Bond.

Know all men by these presents: That we, W. V. Tanner, as Attorney General of the State of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, as County Treasurer of Spokane County, State of Washington, as prinsipals, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to act as surety and to do business in the State of Washington, as surety, are held and firmly bound unto John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, doing business as Ryan and Oathout, Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a
113 corporation, Charles E. Marr, Sam Langert and Sidney Kellner, Co-partners, Louis K. Lefevre and Elza K. Pearson, Co-partners, appelle-s above named, in the full and just sum of $250.00, for the payment of which well and truly to be made, we hereby bind our and each of our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated at Spokane, Washington, this 26th day of June, 1914.

Whereas, the Appellants above named have duly appealed from the final decree herein, and orders theretofore in said cause made, to the Supreme Court of the United States, and

Whereas, the above entitled court fixed the amount of bond to be given by said Appellants in their appeal in the sum of $250.00.

Now, therefore, if the appellants shall prosecute their appeal to

effect, and if they fail to make their plea good shall answer all costs, then this obligation shall be null and void; otherwise to remain in full force and effect.

(Signed) W. V. TANNER, [SEAL.]
As Attorney General of the State of Washington.

(Signed) GEORGE H. CRANDALL, [SEAL.]
As Prosecuting Attorney of Spokane County, Washington.

(Signed) E. W. EVENSON, [SEAL.]
As County Treasurer of Spokane County, Washington.

(Signed) AMERICAN SURETY COMPANY OF NEW YORK, *Surety,*

[Seal of Surety Co.]

By J. H. BROWN,
Its Attorney in Fact.

The foregoing bond and the surety thereon is approved this 27th day of June, 1914.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

114 Endorsements: Bond on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

115 United States District Court, Eastern District of Washington, Northern Division.

No. —. Original.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre, and Eliza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Citation.

UNITED STATES OF AMERICA,
Ninth Circuit:

To John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pearl Laundry Company, a corporation; Chas E. Marr, Sam Langberg and Sidney Kellner, Co-partners, Louis K. Lefevre and Eliza K. Pearson, Co-partners:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, within sixty days after the date of this Citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the Eastern District of Washington, Northern Division, wherein W. V. Tan-
116 ner, as Attorney General of the state of Washington, George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, E. W. Evenson, County Treasurer of Spokane County, State of Washington, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, and the seal of said United States District Court this 27 day of June, 1914.

[Seal of the United States District Court, Eastern District of Washington.]

FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division.

[Endorsed:] # 1106. Original. John T. Little, et al., appellees, vs. W. V. Tanner, et al., appellants. Citation. Filed in the U. S. District Court, Eastern District of Washington, Jun- 27, 1914. W. H. Hare, Clerk.

117 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Acceptance of Service.

Due, regular and timely service of the citation on appeal of the above-entitled cause from the United States District Court, Eastern District of Washington, Northern Division, to the Supreme Court of the United States, and of præcipe for record on appeal of said cause, and receipt of copies of the petition for allowance of appeal, assignment of errors, and appeal bond for the appeal of said cause, is hereby admitted this 3rd day of July, 1914.

(Signed) W. T. DOVELL,
Of Attorneys for All Appellees.

Endorsements: Acceptance of Service. Filed in the U. S. District Court for the Eastern District of Washington, July 7, 1914. W. H. Hare, Clerk, By Frank C. Nash, Deputy.

118 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Præcipe for Record on Appeal.

To the Clerk of the above-entitled court:

Please prepare and certify forthwith a complete transcript of the entire record in the above entitled cause on appeal to the Supreme Court of the United States.

(Signed) W. V. TANNER,
(Signed) D. V. HALVERSTADT.
Solicitors for Appellants.

Endorsements: Præcipe for Record on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

119 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Clerk's Certificate to Transcript of the Record.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the fore-

going pages numbered from one (1) to One Hundred and Eighteen (118), inclusive, constitute and are a complete, true and correct copy of the record, pleadings, orders and all proceedings had in said action, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the order of appeal, lodged and filed in my office on the 25th day of June, 1914.

And I hereby annex and transmit the original Citation issued and filed in said suit.

I further certify that the cost of preparing and certifying said record amounts to the sum of $90.70, and that the same has been paid in full by the defendants and appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Spokane in said
120 Eastern District of Washington, in the Ninth Judicial Circuit, this 14th day of July, A. D., 1914, and the Independence of the United States of America the One Hundred and Thirty-ninth.

[Seal of the United States District Court, Eastern District of Washington.]

W. H. HARE,
Clerk U. S. District Court for the Eastern District of Washington.

[Endorsed:] No. —. In the District Court of the United States for the Eastern District of Washington. John T. Little et al., Complainants, vs. W. V. Tanner et al., Defendants. Transcript of Record on Appeal.

Endorsed on cover: File No. 24,339. E. Washington D. C. U. S. Term No. 595. W. V. Tanner, as attorney general of the State of Washington; George H. Crandall, prosecuting attorney of Spokane county, State of Washington, and E. W. Evenson, county treasurer of Spokane county, State of Washington, appellants, vs. John T. Little, August Stahlberg, Lawrence Ryan, and Wm. T. Oathout, doing business as Ryan and Oathout, et al. Filed August 10, 1914. File No. 24,339.

2

OFFICE OF THE CLERK
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SUPREME COURT U.S.

Supreme Court of the United States

OCTOBER TERM, 1915.

Nos. 224, 242.

W. V. TANNER, Attorney General of the State of Washington, *Et Al., Appellants,*

v.

JOHN T. LITTLE, Et Al.

F. S. PITNEY, Plaintiff in Error,

v.

THE STATE OF WASHINGTON.

Opinion of the Federal Judges in Case of Cottrell, Et Al., vs. Attorney General of Oregon, Et Al,, Filed October 4th, 1915.

Hughes, McMicken, Dovell & Ramsey,

Frank T. Wolcott,

Louis Marshall,

S. & M. Stroock.

News Printing Co., Paterson, N. J.

No. 6773.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the District of Oregon.

L. I. COTTRELL, doing business as Cottrell's Montavilla Grocery; WOODARD, CLARKE & COMPANY, a Corporation; JOHN H. COWLS; EDWARD McBURNEY; B. F. CUNNINGHAM; P. J. PETERSON and C. H. REED, Copartners doing business as Peterson & Reed; and J. WOOLACH and M. J. WOOLACH, Copartners doing business as Woolach & Son,

Plaintiffs,

v.

THE SPERRY & HUTCHINSON COMPANY, a Corporation, GEORGE M. BROWN, Attorney General of the State of Oregon, and WALTER H. EVANS, District Attorney of Multnomah County, State of Oregon,

Defendants.

Before GILBERT, Circuit Judge, and WOLVERTON and BEAN, District Judges.

Chris. A. Bell, for Plaintiffs.

Hughes, McMicken, Dovell & Ramsey, and Frank T. Wolcott for Sperry & Hutchinson Company.

George M. Brown, I. H. Van Winkle, Walter H. Evans, D. V. Halverstadt and Frederick H. Whitfield for Defendants Brown and Evans.

Opinion of the Court.
Per Curiam.

This is a suit to enjoin the Sperry & Hutchinson Company from violating its contracts whereby the company has agreed, under stipulated conditions and regulations, to furnish to the plaintiffs certain trading stamps and to observe certain regulations relating to the use thereof, and also to enjoin the other defendants, who are state officers, from enforcing the provisions of Chapter 228 General Laws of Oregon, 1915, known as the Trading Stamp Act.

The act purports to levy an excise tax of five per cent. annually on the gross receipts of every person, firm or corporation who shall use or who shall furnish to any other person, firm, or corporation, for use in connection with the sale of any goods, wares or merchandise in the State of Oregon, any stamps, coupons, or tickets commonly known as trading stamps.

It is at once apparent that the tax levied was intended and designed by the legislature to be of such proportions as to be inhibitive of the use of such trading stamps within the state. In a case of like nature, arising under similar conditions in the State of Washington, the law was held by the District Court for the Eastern District of Washington, three judges sitting, to be void as in contravention of the equality clause of the 14th amendment to the Federal Constitution. Little v. Tanner, 208 Fed. 605. The doctrine of that case is altogether applicable to, and is decisive of, the issues here involved.

Without, therefore, entering upon further discussion of the controversy, we hold the act in question to be without validity, and void. Let a decree be entered enjoining the enforcement of the act, as prayed, with costs to the complainants.

Filed October 4th, 1915.

3

OFFICE OF THE CLERK
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SUPREME COURT U. S.

The Trading Stamp Cases

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

Nos. 224, 242.

W. V. TANNER, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL., APPELLANTS,

v.

JOHN T. LITTLE, ET AL.

F. S. PITNEY, PLAINTIFF IN ERROR,

v.

THE STATE OF WASHINGTON.

OPINION OF THE SUPREME COURT OF LOUISIANA IN STATE OF LOUISIANA v. CHAS. A. UNDERWOOD, OCTOBER 18, 1915.

W. V. TANNER,
Attorney General of the State of Washington,
DALLAS V. HALVERSTADT,
BLACKBURN ESTERLINE,
Solicitors for Appellants in No. 224, and for Defendant in Error in No. 242.

II.

The District Court of the United States for the Eastern District of Washington, erred in denying the motion of the appellant,
105 George H. Crandall as Prosecuting Attorney of Spokane County, State of Washington, to dismiss the bill of complaint and amended bill of complaint herein.

III.

The District Court of the United States for the Eastern District of Washington, erred in denying the motion of the appellant, E. W. Evenson as County Treasurer of Spokane County, State of Washington, to dismiss the bill of complaint and amended bill of complaint herein.

IV.

The District Court of the United States for the Eastern District of Washington, erred in entering an order for a decree pro confesso herein, upon the appellants above named, announcing that they stood on their several motions to dismiss and declining to plead further.

V.

The District Court of the United States for the Eastern District of Washington, erred in perpetually enjoining and restraining the appellants above named from bringing directly or indirectly any proceeding at law or in equity for the collection of any tax, or any sum of money imposed under the provisions of Chapter 134, of the Session Laws of the State of Washington for 1913, being "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares, and merchandise, and providing a penalty for violation thereof", and said Act having been passed by the House March 4, 1913, passed by the Senate March 12, 1913, and approved by the Governor March 20, 1913, and from causing the appelle-s, or eother or any of them, or their officers, agents, servants or employes, or any one interest- similarly as the said appelle-s, or either or any
106 of them, or their officers, agents, servants or employes, to be arrested for violation of the provisions of said Act, and from taking any other action or in any other manner interfering with complainants, or either of them, or any other person similarly situated, or their business, by reason of said Act.

VI.

The District Court of the United States for the Eastern District of Washington, erred in not dismissing the bill of complaint herein.

VII.

The District Court of the United States for the Eastern District of Washington, erred in not dismissing the amended bill of complaint herein.

VIII.

The District Court of the United States for the Eastern District of Washington erred in holding said Act of the State of Washington above mentioned to be in contravention of the Fourteenth Amendment to the Constitution of the United States.

IX.

The District Court of the United States for the Eastern District of Washington erred in holding said Act above mentioned to be — contravention of Section 3, Article I, of the Constitution of the State of Washington, wherefore appellants pray that said decree be reversed and will ever pray.

(Signed) W. V. TANNER,
(Signed) D. V. HALVERSTADT,
Solicitors for Appellants.

Endorsements: Assignment of Errors. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk, By Frank C. Nash, Deputy.

107 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Petition for Allowance of Appeal.

The above named appellants, W. V. Tanner as Attorney General of the State of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, as County Treasurer of Spokane County, State of Washington, deeming themselves aggrieved by the judgment and decree of the United States District Court, rendered on the 6th day of October, 1913, perpetually enjoining and restraining the defendants above named from enforcing Chapter 134 of the Session Laws of the

State of Washington for 1913, being "An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device for, or with the sale of goods, wares and merchandise and providing a penalty for violation thereof", the said Act having been passed by the House March 4, 1913, by the
108 Senate March 12, 1913, and approved by the Governor March 20, 1913, and from causing the appellees above named, or any of them, or their officers, agents, servants or employes, or any one interest- similarly as the said appelle-s or any of them, or their officers, agents, servants, or employes to be arrested for violation of the provisions of said Act, and from taking any other action, or in any other manner interfering with appellees or any of them, or any other person similarly situated, or their business by reason of said Act, and from bringing directly or indirectly any proceeding at law or in equity, for the collection of any tax or any sum of money imposed under the provisions of said Chapter, and by the orders of said District Court theretofore made in said cause, denying the several motions of said appellants to dismiss the bill of complaint and amended bill of complaint, do hereby appeal from said decree of said United States District Court to the Supreme Court of the United States.

The matter in controversy in said action and on this appeal exceeds the sum of $3000.00, exclusive of interest and costs. This cause is one in which an appeal exists as a matter of right to the Supreme Court of the United States.

Wherefore, the said appellants pray that an appeal be allowed them in the above-entitled cause, and that a transcript of the record and proceedings in said cause with all things concerning the same be sent to the Supreme Court of the United States, in order that the errors complained of in the Assignment of errors herein filed by the said appellants may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Signed) W. V. TANNER,
As Attorney General of the State of Washington.
(Signed) GEORGE H. CRANDALL,
Prosecuting Attorney of Spokane County, State of Washington.
109 (Signed) E. W. EVENSON,
County Treasurer of Spokane County, State of Washington.
(Signed) W. V. TANNER,
(Signed) D. V. HALVERSTADT,
Solicitors for Appellants.

Endorsements: Petition for Allowance of Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

110 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Order Allowing Appeal.

It is hereby ordered that the appeal prayed for by the above named appellants in the above entitled cause to the Supreme Court of the United States, be, and the same hereby is allowed as prayed.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Endorsements: Order Allowing Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

111 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Order Fixing Amount of Bond on Appeal.

On reading the petition of the above named appellants in the above entitled cause for the allowance of an appeal to the Supreme Court of the United States from the judgment and decree of the District Court of the United States for the Eastern District of Washington, rendered therein,

It is ordered that the appellants above named, execute and file in the office of the clerk of the above-entitled court a bond on appeal, conditioned according to law, in the sum of $250.00, with good and sufficient surety to be approved by the undersigned.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Endorsements: Order Fixing Amount of Bond on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 25, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

112 In the District Court of the United States within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre and Elza K. Pearson, Copartners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Appeal Bond.

Know all men by these presents: That we, W. V. Tanner, as Attorney General of the State of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, as County Treasurer of Spokane County, State of Washington, as prinsipals, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to act as surety and to do business in the State of Washington, as surety, are held and firmly bound unto John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, doing business as Ryan and Oathout, Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a
113 corporation, Charles E. Marr, Sam Langert and Sidney Kellner, Co-partners, Louis K. Lefevre and Elza K. Pearson, Co-partners, appelle-s above named, in the full and just sum of $250.00, for the payment of which well and truly to be made, we hereby bind our and each of our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated at Spokane, Washington, this 26th day of June, 1914.

Whereas, the Appellants above named have duly appea'ed from the final decree herein, and orders theretofore in said cause made, to the Supreme Court of the United States, and

Whereas, the above entitled court fixed the amount of bond to be given by said Appellants in their appeal in the sum of $250.00,

Now, therefore, if the appellants shall prosecute their appeal to

effect, and if they fail to make their plea good shall answer all costs, then this obligation shall be null and void; otherwise to remain in full force and effect.

(Signed) W. V. TANNER, [SEAL.]
As Attorney General of the State of Washington.

(Signed) GEORGE H. CRANDALL, [SEAL.]
As Prosecuting Attorney of Spokane County, Washington.

(Signed) E. W. EVENSON, [SEAL.]
As County Treasurer of Spokane County, Washington.

(Signed) AMERICAN SURETY COMPANY OF NEW YORK, *Surety,*

[Seal of Surety Co.]

By J. H. BROWN,
Its Attorney in Fact.

The foregoing bond and the surety thereon is approved this 27th day of June, 1914.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

114 Endorsements: Bond on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, June 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

115 United States District Court, Eastern District of Washington, Northern Division.

No. —. Original.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and William T. Oathout, Doing Business as Ryan & Oathout Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Copartners; Louis K. Lefevre, and Eliza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Citation.

UNITED STATES OF AMERICA,
Ninth Circuit:

To John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed Schimmel, Marie C. J. Bille, Carrie M. Noernberg, Lena M. Royce, Pearl Laundry Company, a corporation; Chas E. Marr, Sam Langberg and Sidney Kellner, Co-partners, Louis K. Lefevre and Eliza K. Pearson, Co-partners:

You and each of you are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, within sixty days after the date of this Citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the Eastern District of Washington, Northern Division, wherein W. V. Tan-
116 ner, as Attorney General of the state of Washington, George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, E. W. Evenson, County Treasurer of Spokane County, State of Washington, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Frank H. Rudkin, United States District Judge for the Eastern District of Washington, and the seal of said United States District Court this 27 day of June, 1914.

[Seal of the United States District Court, Eastern District of Washington.]

FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division.

[Endorsed:] # 1106. Original. John T Little, et al., appellees, vs. W. V. Tanner, et al., appellants. Citation. Filed in the U. S. District Court, Eastern District of Washington, Jun- 27, 1914. W. H. Hare, Clerk.

117 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and William T. Oathout, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Acceptance of Service.

Due, regular and timely service of the citation on appeal of the above-entitled cause from the United States District Court, Eastern District of Washington, Northern Division, to the Supreme Court of the United States, and of præcipe for record on appeal of said cause, and receipt of copies of the petition for allowance of appeal, assignment of errors, and appeal bond for the appeal of said cause, is hereby admitted this 3rd day of July, 1914.

(Signed) W. T. DOVELL,
Of Attorneys for All Appellees.

Endorsements: Acceptance of Service. Filed in the U. S. District Court for the Eastern District of Washington, July 7, 1914. W. H. Hare, Clerk, By Frank C. Nash, Deputy.

118 In the District Court of the United States Within and for the Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and WILLIAM T. OATHOUT, Doing Business as Ryan & Oathout; Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation; Chas. E. Marr, Sam Langert, and Sidney Kellner, Co-partners; Louis K. Lefevre and Elza K. Pearson, Co-partners, Appellees,

vs.

W. V. TANNER, as Attorney General of the State of Washington; George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington; E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appellants.

Pracipe for Record on Appeal.

To the Clerk of the above-entitled court:

Please prepare and certify forthwith a complete transcript of the entire record in the above entitled cause on appeal to the Supreme Court of the United States.

(Signed) W. V. TANNER,
(Signed) D. V. HALVERSTADT.
Solicitors for Appellants.

Endorsements: Pracipe for Record on Appeal. Filed in the U. S. District Court for the Eastern District of Washington, July 10, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

119 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1706.

JOHN T. LITTLE et al., Complainants,

vs.

W. V. TANNER, as Attorney General of the State of Washington, et al., Defendants.

Clerk's Certificate to Transcript of the Record.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the fore-

going pages numbered from one (1) to One Hundred and Eighteen (118), inclusive, constitute and are a complete, true and correct copy of the record, pleadings, orders and all proceedings had in said action, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the order of appeal, lodged and filed in my office on the 25th day of June, 1914.

And I hereby annex and transmit the original Citation issued and filed in said suit.

I further certify that the cost of preparing and certifying said record amounts to the sum of $90.70, and that the same has been paid in full by the defendants and appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Spokane in said
120 Eastern District of Washington, in the Ninth Judicial Circuit, this 14th day of July, A. D., 1914, and the Independence of the United States of America the One Hundred and Thirty-ninth.

[Seal of the United States District Court, Eastern District of Washington.]

W. H. HARE,
Clerk U. S. District Court for the Eastern District of Washington.

[Endorsed:] No. —. In the District Court of the United States for the Eastern District of Washington. John T. Little et al., Complainants, vs. W. V. Tanner et al., Defendants. Transcript of Record on Appeal.

Endorsed on cover: File No. 24,339. E. Washington D. C. U. S. Term No. 595. W. V. Tanner, as attorney general of the State of Washington; George H. Crandall, prosecuting attorney of Spokane county, State of Washington, and E. W. Evenson, county treasurer of Spokane county, State of Washington, appellants, vs. John T. Little, August Stahlberg, Lawrence Ryan, and Wm. T. Oathout, doing business as Ryan and Oathout, et al. Filed August 10, 1914. File No. 24,339.

2

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Supreme Court of the United States

OCTOBER TERM, 1915.

Nos. 224, 242.

W. V. TANNER, Attorney General of the State of Washington, *Et Al., Appellants,*

v.

JOHN T. LITTLE, Et Al.

F. S. PITNEY, Plaintiff in Error,

v.

THE STATE OF WASHINGTON.

Opinion of the Federal Judges in Case of Cottrell, Et Al., vs. Attorney General of Oregon, Et Al,, Filed October 4th, 1915.

Hughes, McMicken, Dovell & Ramsey,

Frank T. Wolcott,

Louis Marshall,

S. & M. Stroock.

News Printing Co., Paterson, N. J.

No. 6773.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the District of Oregon.

L. I. COTTRELL, doing business as Cottrell's Montavilla Grocery; WOODARD, CLARKE & COMPANY, a Corporation; JOHN H. COWLS; EDWARD McBURNEY; B. F. CUNNINGHAM; P. J. PETERSON and C. H. REED, Copartners doing business as Peterson & Reed; and J. WOOLACH and M. J. WOOLACH, Copartners doing business as Woolach & Son,

Plaintiffs,

v.

THE SPERRY & HUTCHINSON COMPANY, a Corporation, GEORGE M. BROWN, Attorney General of the State of Oregon, and WALTER H. EVANS, District Attorney of Multnomah County, State of Oregon,

Defendants.

Before GILBERT, Circuit Judge, and WOLVERTON and BEAN, District Judges.

Chris. A. Bell, for Plaintiffs.

Hughes, McMicken, Dovell & Ramsey, and Frank T. Wolcott for Sperry & Hutchinson Company.

George M. Brown, I. H. Van Winkle, Walter H. Evans, D. V. Halverstadt and Frederick H. Whitfield for Defendants Brown and Evans.

Opinion of the Court.
Per Curiam.

This is a suit to enjoin the Sperry & Hutchinson Company from violating its contracts whereby the company has agreed, under stipulated conditions and regulations, to furnish to the plaintiffs certain trading stamps and to observe certain regulations relating to the use thereof, and also to enjoin the other defendants, who are state officers, from enforcing the provisions of Chapter 228 General Laws of Oregon, 1915, known as the Trading Stamp Act.

The act purports to levy an excise tax of five per cent. annually on the gross receipts of every person, firm or corporation who shall use or who shall furnish to any other person, firm, or corporation, for use in connection with the sale of any goods, wares or merchandise in the State of Oregon, any stamps, coupons, or tickets commonly known as trading stamps.

It is at once apparent that the tax levied was intended and designed by the legislature to be of such proportions as to be inhibitive of the use of such trading stamps within the state. In a case of like nature, arising under similar conditions in the State of Washington, the law was held by the District Court for the Eastern District of Washington, three judges sitting, to be void as in contravention of the equality clause of the 14th amendment to the Federal Constitution. Little v. Tanner, 208 Fed. 605. The doctrine of that case is altogether applicable to, and is decisive of, the issues here involved.

Without, therefore, entering upon further discussion of the controversy, we hold the act in question to be without validity, and void. Let a decree be entered enjoining the enforcement of the act, as prayed, with costs to the complainants.

Filed October 4th, 1915.

3

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The Trading Stamp Cases

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

Nos. 224,

W. V. TANNER, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL., APPELLANTS,

v.

JOHN T. LITTLE, ET AL.

F. S. PITNEY, PLAINTIFF IN ERROR,

v.

THE STATE OF WASHINGTON.

OPINION OF THE SUPREME COURT OF LOUISIANA IN STATE OF LOUISIANA v. CHAS. A. UNDERWOOD, OCTOBER 18, 1915.

W. V. TANNER,
Attorney General of the State of Washington,
DALLAS V. HALVERSTADT,
BLACKBURN ESTERLINE,
Solicitors for Appellants in No. 224, and for Defendant in Error in No. 242.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA.

SUPREME COURT OF THE STATE OF LOUISIANA.

NEW ORLEANS, MONDAY, October 18th, 1915.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors:

FRANK A. MONROE, *Chief Justice.*

OLIVIER O. PROVOSTY,
ALFRED D. LAND,
WALTER B. SOMMERVILLE,
CHARLES A. O'NIELL,
Associate Justices.

His Honor, Mr. Chief Justice Monroe Pronounced the opinion and Judgment of the Court in the following cases:

MONDAY, October 18th, 1915.

Mr. Chief Justice Monroe.

No. 20,329.

STATE OF LOUISIANA

vs.

CHAS. A. UNDERWOOD OR SOUTHERN MERCHANDISE EXCHANGE.

Appeal from the Civil District Court, Parish of Orleans, Skinner, J.

SYLLABUS.

1. A person who is engaged in ditributing, gratuitously, to all comers and in tartering, with all comers, the coupons of the Hamilton Corporation of New York, is engaged in issuing trading stamps, within the meaning of Act 47 of 1904 (amending and re-enacting Sec. 15 of Act 171 of 1898), and is liable for the license tax thereby imposed.

2. Act 47 of 1904 (amending and re-enacting Sec. 15 of Act 171 of 1898) is not in contravention of Art. 225 or Art. 229 of the State Constitution, or Art. 1, Sec. 8 of the Constitution of the United States, or of the 14th amendment to that Constitution.

3. In the District of Columbia, where the paramount laws of the land are made and authoritatively construed, there is, now, and for more than forty years, has been, in force, an act of Congress making it a penal offense to engage in any gift enterprise in that District, which act has been, and is now, applied to the trading stamp business, notwithstanding that, as thus applied, it has been, time and again, attacked, as in contravention of the Constitution of the United States, and notwithstanding that the Supreme Court of the United States has been, time and again, applied to for the reviewal and reversal of the rulings of the District of Columbia Court of Appeals, repelling such attacks. In view of those facts, there can be no reaon, arising under the Constitution of the United States, why, until the Supreme Court of the United States shall have decided to the contrary, this Court, yielding its own convictions, should hold that the State of Louisiana is not at liberty to adhere to, and enforce, its public policy as to the grave question concerning the rights of the individual, considered with reference to the rights of the community, which is here put at issue.

Statement of the Case.

Plaintiff ruled "Charles A. Underwood, doing business under the name of Southern Merchandise Exchange; Charles A. Underwood, Proprietor," into Court, alleging that he is, and has been since June 1, 1913, "engaged in the busi- "ness of a dealer in trading stamps, in the City of New "Orleans, issuing trading stamps to merchants or dealers, "without having paid * * * a license tax," and praying that he be required to show cause why judgment should not be rendered against him in the sum of $5,000, as the license tax for the year 1913, with interest, &c., and why he should not be enjoined from conducting his business until the tax shall have been paid.

The proceeding is founded upon so much of act 47 of 1904, amending and re-enacting section 15 of act 171 of 1898 (the State license law) as reads:

"For every trading stamp company, and all other dealers "of every kind whatsoever, issuing stamps to merchants or "dealers, where the gross annual receipts are more than "$200,000, the license shall be $10,000; where the gross an- "nual receipts are $150,000 or more, and less than $200,000, "the license shall be $7,500; where the gross annual receipts "are $100,000 and less the license shall be $5,000."

Defendant denies that he is engaged in the business described in the statute, and alleges that his business consists of the sale, or barter, of various articles of merchandise which are sold to the public, generally, for cash, or exchange for coupons or premium tokens, or the like, having a money value; such coupons or tokens, issued by any reliable concern being so received, in exchange for merchandise, and the value thereof being afterwards collected from the original issuers. He sets up the further defence, in the alternative, that, as applied to his business the statute relied on contra-

venes the State and Federal Constitutions, for certain reasons, which he specifies.

On the trial of the rule, there were but two witnesses examined, the defendant and another called on his behalf. The testimony of the other witness is wholly unimportant; that of defendant is disingenuous. We gather from it the impression that, although he may be, or may think he is, in a position to swear that he is not the agent of "The Hamilton Corporation" (a New York Trading Stamp Company), and that he has no other connection with that company than as a receiver, purchaser, or collector, barterer and vendor of its stamps (or "Coupons," as he prefers to call them), and, although his primary object in establishing himself in New Orleans, is, no doubt, to make money, for himself; he, nevertheless, came here, in April, 1913, under an agreement with The Hamilton Corporation and, sometime in June, opened a store at No. 608 Canal Street, in the name of the "Southern Merchandise Exchange, Charles A. Underwood, Proprietor," and, as it appears to us, the principal basis and means through which he expects to succeed in the business that he is there conducting is the promotion and development of the business of The Hamilton Corporation. He admits that that corporation is his surety for the rent of his store, under a lease for three years at $300 a month, though he testifies that he does not know the name of either its president, secretary or treasurer. There was exhibited to him a full page advertisement, in a New Orleans daily newspaper of June 29, 1913, containing illustrations of furniture, musical instruments, toilet articles, &c.; also, what purports to be a reproduction of a "Hamilton Coupon," and reading, in part, as follows:

"Here's the Magic Money That Buys These Valuable "Premiums.

"Hamilton Coupons.

"They are Packed with Popular Goods, You Buy Every Day. "You can Exchange Them for Valuable Premiums Right "Here in New Orleans.

* * * * * * *

"You are invited "to call and in- "spect these pre- "miums. You can "then appreciate "the wide variety "of high grade "merchandise you "can obtain by "saving your "Hamilton Cou- "pons, which come "packed with "goods you use "daily.	Buy the Goods Listed Below.	25 Hamilton Coupons Free. You are invited to visit the Exchange at 608 Canal St. and you will be presented with twenty-five (25) complimentary coupons, with which to start your collection, a complete list of goods with which Hamilton Coupons are packed, and a beautiful illustrated catalogue showing the premiums you can obtain in exchange for your Hamilton coupons.

"The Southern Merchandise Exchange.

"608 Canal Street, Charles A. Underwood, Proprietor. The "Store That's Different."

And he gave the following testimony concerning it, to-wit:

"Q. I show you a page advertisement, dated Sunday morn- "ing June 29, 1913, * * * and ask you to look at this

"line and state whether or not this was put in there by you? "A. No sir. Q. You had nothing to do with it? A. No, "sir; I had nothing to do with it. Q. Can you account for "its appearance? A. I presume the Hamilton Corporation "of New York did it. Q. I notice the words at the bottom "of the advertisement, in large type, 'The Southern Mer- "chandise Exchange, 608 Canal Street, Charles A. Under- "wood, Proprietor. The Store That's Different.' Does that "refer to your store? A. Yes, it must. Q. What is your "connection with the Hamilton Corporation of New York? "A. None, whatever, except that I buy goods from them, "the same as other merchants. Q. Simply the relation of "buyer and seller? A. Yes sir. Q. You are not an agent "of the Hamilton Corporation? A. No, sir. Q. You "do not handle their coupons? A. Yes, sir, I buy "them of them. Q. What do you do with them when you "buy them? A. Exchange them for hundreds of other "kinds of coupons. Q. You are in the coupon business? A. "Yes, sir. Q. You buy and sell these coupons? A. I sell all "kinds of coupons, including the Hamilton, not to people, "but to manufacturers. Q. If any one comes into your "store and asks for twenty-five free coupons, do you inquire "whether or not he is a merchant? A. No, sir. Q. Are "you willing to swear that none of the coupons are issued "to merchants? A. No, I cannot do that, * * *. Q. "You say this advertisement appeared in the paper without "your knowledge or consent? A. Yes, sir. * * *. Q. "Read that advertisement and see whether that states fairly "the character of business that you are doing? A. I can "hardly tell * * *. Q. For instance, this advertise- "ment reads: 'You are invited to visit the Exchange at 608 "Canal street, and you will be presented with twenty-five "(25) complimentary coupons with which to start your col- "lection, a complete list of goods with which Hamilton "Coupons are packed and a beautifully illustrated catalogue "showing the premiums you can obtain for your Hamilton

"Coupons' that is a fact, is it not? A. What is a fact? Q. "You mean to pretend to do what this advertisement claims "you do? A. We give them a catalog, which is furnished by "the Hamilton Corporation and a coupon. * * *. Q. "Do you carry the stock of articles that are mentioned in "that illustrated catalog. A. Some of them and some that "are not illustrated there; I am (not) confined to that "catalog entirely."

The witness is then further cross-examined in regard to certain advertising "dodgers" and, concerning one of them, testifies as follows:

"Q. I call attention to the wording of the advertisement; "after requesting that everybody collect 'your coupons,' "they have this little paragraph, headed, 'Trading Stamp "Collectors may exchange their Hamilton Coupons on an "equal basis for trading stamps at the premium parlors of "many responsible stamp collectors,' do you stand back of "that advertisement? A. Can I explain. Q. Yes, but "answer yes or no, first, do you vouch for that statement in "that advertisement? A. No, sir; I do not vouch for it. Q. "You do not know that it is there? A. I presume I read it. "Now this is printed and published by the Hudson Con-"densed Milk Company. It is a fact that Hamilton Cou-"pons are exchangeable in every State in the Union, except "Florida and Louisiana, for different kinds of trading "stamps, and these are nationally distributed; they might "go to California or Maine, and some of them come down "here; and you will see that it is on almost all circulars "where they say something about trading stamps, but, so "far as I am concerned, these are furnished to me by the "manufacturers and the words on there are up to them."

The witness was asked whether his business in this City was not the soliciting of merchants with a view of inducing them to place Hamilton coupons in the goods sold by them,

and, whether he was not conducting an Exchange where Hamilton coupons can be bartered for the articles mentioned in the Hamilton Catalog. To the first question, he answered "no," but, on further cross-examination, he said that he had *talked* to grocers about Hamilton Coupons but had not solicited them. He was then unable to remember what he had said in his conversations, but finally, recalled that he had solicited the grocers to sell goods in which Hamilton coupons are packed, his object being to have more Hamilton coupons come back to his store.

"These coupons" (he states) "are taken in exchange for "merchandise, money, or coupons, anything that you will "bring, in my store."

"Q. You will swap anything in your store for these Hamil- "ton coupons? A. Yes, for anything else that has value. "* * * Q. So the purpose of your store is to redeem the "Hamilton Coupons? A. No, sir; we redeem them and "other coupons."

The witness then refers to a pamphlet containing a list of "other coupons," in which he deals, and further testifies:

"Q. Now, I call your attention to the fact that this pam- "phlet * * * declares that these coupons are exchange- "able for Hamilton coupons? A. We make that Hamilton "Coupon as a unit. Q. The Hamilton coupon is a unit "in your business? A. Yes, sir. Q. That is a standard of "value for all coupons? A. Yes, sir. * * * Q. On page "3 of this catalog, under the heading, "Where to Exchange "your Hamilton Coupons for Premiums," I find the follow- "ing: "For the convenience of collectors, we have established "more than 500 local premium stations where they may take "their coupons and exchange them for premiums." Are you "running one of these article premium stations referred to "here? A. Not, in that sense at all * * *. Q. Neverthe- "less, you give out this catalog? A. Yes, sir. Q. Do you not "tell them to redeem them at your place. A. I tell them

" that they can be redeemed there. Q. What is the difference, " Mr. Underwood? A. Well, because they redeem them in al- " most every City in the United States. Q. What is the differ- " ence between your establishment and one of these 500 local " premiums stations, referred to in this catalog? A. Those " referred to in this book are owned by the Hamilton Cor- " poration, and this one is owned by me. * * * Q. Now, " then, you say, that you buy these coupons, Mr. Underwood, " is that a fact? A. Not for cash. Q. What do you give for " them? A. Merchandise. Q. That is to the collector? A. " Yes, sir. Q. Then, what do you do with the coupons that " you get from the collector? A. They are sent to New York. " Q. To whom, in New York? A. To the Hamilton Corpora- " tion. Q. All of them? A. Yes, with the exception of the " "Item's," and one local concern. Q. What does the Hamil- " ton Corporation give you for the Hamilton Coupons? A. " Two dollars a thousand. Q. In cash? A. No, not in cash; " but they are credited against my account: I buy goods from " them. Q. What do you do with the other coupons which " are referred to in this list of 250 coupons? A. They are " sold to the Hamilton Corporation in payment of goods I " buy from them."

The witness testifies that he does a cash business at his store amounting, in gross receipts, to about $5 a day, and he is then further examined:

" Q. Where do you get the cash from, other than the $5 a " day, where does your cash come in from. In other words, " how do you make any money out of that store? A. It takes " time to work up a business like this; you can't expect to " make money right off the reel. Q. You must touch money " at some time? A. I have some money of my own. Q. " When will it come back? A. In time; my coupons exceed " the merchandise bought. Q. When does that happen? A. " Any time I make a settlement. Q. How often do you make " these settlements? A. I haven't made any yet. Q. Have

"you any stated time to make a settlement? A. No, sir. "* * * Q. You say you have an arrangement for a set- "tlement with them" (the Hamilton Company)? "A. Not "at present because I have been too busy; not on coupons. "Q. Have you any other arrangement with them? A. No, "* * * Q. You have made no arrangement for a settle- "ment? A. No; I haven't asked for one. Q. And there is "no stated time, either monthly, annually, or semi-annually "for a settlement? A. No, there has been no settlement "made, but, there has been an exchange of statements. Q. "But there is no stated time at which settlements are made "between you and the Hamilton Corporation? A. No, sir."

The witness appears to contradict himself on several important points and to be rather unintelligible on others, as for instance:

On the direct examination:

"Q. Are you engaged in selling coupons? A. No, sir."

On cross-examination:

"Q. You buy and sell these coupons? A. I sell all kinds "of coupons including the Hamilton, not to people, but to "manufacturers."

On redirect examination:

"Q. Do you sell any Hamilton coupons at all? A. No, sir, "I do not. * * * Q. Do you sell any Hamilton coupons "to manufacturers? A. No, sir."

On cross-examination:

"Q. If any one comes into your store and asks for twenty- "five free coupons, do you inquire whether or not he is a mer- "chant? A. No, sir. Q. Are you willing to swear that none "of these coupons are issued to merchants? A. No, sir; I "cannot do that."

On redirect examination:

"Q. Have you ever delivered Hamilton coupons to mer-
"chants or dealers in this City? A. No, never."

On direct examination:

"Q. Have you ever issued any coupons to any persons with
"the promise, express or implied, that you would redeem
"these coupons? A. No, sir."

On cross-examination:

"Q. Nevertheless, you give out this catalog? A. Yes, sir.
"Q. You give it to collectors of Hamilton coupons? A. Yes,
"sir. Q. Do you tell them to redeem them at your place?
"A. I tell them that they can be redeemed there."

At another time, in his redirect examination, he testifies as follows:

"Q. Then you are not engaged in the business of redeem-
"ing Hamilton coupons? A. No, sir. Q. You are engaged
"in the brokerage of Hamilton coupons? A. Yes, sir. Q.
"And, also, all other kinds of premium coupons in this city?
"A. Yes, sir. Q. There are 250 different kinds? A. Yes, 250
"to 500 different kinds. Q. Which you give merchants in
"exchange for all different kinds? A. Yes, sir. Q. And you
"sell these different kinds at a price that is agreeable to you?
"A. Yes, sir."

OPINION.

The statute imposes the license tax, not only upon "every Trading Stamp Company, issuing stamps to merchants and dealers," but, also, upon "all other dealers, of every kind whatsoever," who may be engaged in the business so described. It is not necessary, therefore, in order to become liable for the tax, that one should be the originator and ultimate obligor of the stamps issued by him; it is sufficient that he be engaged in the issuing of the stamps, "to merchants or dealers," whether the stamps be originated, and are, ultimately, to be redeemd by him, or by some other person, or trading stamp company.

The evidence in this case leaves no doubt that "Hamilton coupons" are "trading stamps," within the meaning of the statute; and it leaves no doubt that defendant is engaged in selling, bartering and giving away those coupons; nor, can we doubt that, in one or more of those methods, he is engaged in issuing them to "merchants or dealers," as, to other members of the community, since he testifies (and they are among the few points upon which he does not contradict himself) that he distributes "complimentary" Hamilton coupons to all comers, and, as we understand him, barters the regular Hamilton coupons, with all comers, for coupons issued by other concerns, his interest in that business being, that the Hamilton corporation allows $3.50 a thousand (in trade) for such "other" coupons, whereas, it allows but $2 a thousand for its own. The issuance of the "complimentary" Hamilton coupons is an important feature of the business. It is the first step, which counts. It introduces the business for which the license tax is required; and we have no more reason, or authority, for holding that the law maker did not intend that it should be counted as an issuance of coupons, or stamps, than for so holding with regard to the bartering or selling such coupons. As to the selling of the Hamilton coupons, defendant's statement, on cross-exami-

nation, is "I sell all kinds of coupons, including Hamilton, not to people, but to manufacturers." It is true that, in answering, "No," to the questions propounded to him, by his counsel, before and after his cross-examination, he denies selling Hamilton coupons, at all, and denies selling them to manufacturers. But, why, did he make the specific, and, as to those matters, uncalled for, statement, "I sell all kinds of coupons, including Hamilton, not to people, but to manufacturers." The questions propounded did not require him either to include Hamilton coupons among those which he sells, or to exclude manufacturers from the "people" to whom he does not sell. Are we, then, to presume that he went out of his way to say the thing that is not, against his interest; and, if so, why should we accept his denial of that which he says when the denial appears to subserve his interest? The answer is, that the testimony of a litigant, as well as his pleading, is construed against him, upon the theory that he will make the one as well as the other as strong, in his own favor, as he can. We conclude, therefore, that defendant's statement that he sells Hamilton coupons, and sells them to manufacturers, should be accepted as true; and, considering the statute, here in question, with reference to the purpose for which it was enacted, we are inclined to the opinion that the "merchants or dealers," therein referred to, may be included among the "manufacturers," to whom defendant sells the coupons, since manufacturers must buy their raw material, and sell their product, and, in so doing, they become merchants and dealers, as well as manufacturers, and compete with each other and with other merchants and dealers who buy and sell similar articles. It is, however, sufficient, for the purposes of this case, that defendant is engaged in issuing Hamilton coupons, by giving them away and bartering them, and, as he insists upon it that he is doing so upon his own account, and not as the agent of the Hamilton corporation, and the evidence to the contrary is only inferential, we take him at his word, and hold, that, unless his attack

upon the constitutionality of the statute imposing the tax be well founded, he is liable for the tax.

The grounds relied on, as supporting that attack are:

1. That the statute "constitutes unfairly discriminatory, unequal and uniform taxation," in violation of articles 225 and 229 of the State constitution.

2. That the necessary effect of the tax will be to prohibit and destroy the business upon which it is imposed and that defendant is thereby denied the equal protection of the law and is deprived of his property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

3. That the statute operates an an interference with the power of Congress to regulate interstate commerce, in violation of the provision of Art. 1, Sec. 8 of the Constitution of the United States.

The first and third grounds, as thus stated are without merit. Article 225 of the Constitution, requiring equal and uniform taxation, refers, in terms, to taxation on property, and has no application to the taxation of occupations. Art 229, requiring license taxes to be graded, has been compiled in Act 47 of 1904. State *vs.* Merchants Trading Co., Ltd., 114 La., 529. Defendant is engaged in issuing coupons (which we hold to be trading stamps within the meaning of the law) in the city of New Orleans, and we find nothing in the taxing of that business, as he conducts it, which operates as an interference with the power of Congress to regulate interstate commerce.

The remaining question is, in what way does a statute of this State, enacted by the General Assembly in 1904, imposing a particular license upon all persons engaging in a particular business, deny the equal protection of the law to, and deprive of his property, without due process of law, within the meaning of the 14th amendment, a person who came into the State, for the first time, on April 12, 1913? The answer, which the learned counsel for defendant make, is, that, by

the imposition of a prohibitive tax upon the business of issuing trading stamps, defendant has been deprived of that freedom of contract and right of choice, in the matter of a lawful occupation, to which, as a citizen of the United States, he is entitled. But, the learned Counsel do not deny that the State has the power to tax the occupation in which defendant is engaged, and, the Supreme Court of the United States speaking through Judge Marshall, long since, enunciated the doctrine, that: "If the right to impose the tax exists, it is a "right which, in its nature, acknowledges no limits. It may "be carried to any extent, within the jurisdiction of the "State, or corporation which imposes it, which the will of "each State or corporation may prescribe." Weston *et als. vs.* The City Council of Charleston, 2 Pet., 466; L. Ed., 487.

And, it has been held, by this Court, in a suit against a Trading Stamp Company, for a license tax, arising under Act 47 of 1904, that the question of the amount of such tax, to be imposed upon a particular occupation, is for the Legislature, and not the Courts, to determine. State *vs.* Mercantile Trading Co., 114 La., 529.

Conceding, however, that "a person living under our Constitution has the right to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit" (People *vs.* Gillson, 109 N. Y., 389), it must be admitted that a rather delicate situation is brought about when a difference of opinion arises between the community (speaking through its representatives in the Legislature, and the Courts, as to whether a particular pursuit is injurious and unlawful, or innocuous and lawful; and the situation becomes even more difficult when the Courts, themselves, disagree with respect to the character of the same pursuit, and the constitutionality of statutes, taxing, regulating or prohibiting it.

From a lately issued volume of a publication of the highest merit, we make the following excerpt in regard to the pursuit under consideration, to wit:

"The Courts in the several jurisdictions differ in their " attitude towards the validity of laws restricting the issuance " of trading stamps. Such laws, forbidding any person to " sell, give away, or distribute any stamp, coupon, or other " device which will enable a purchaser to demand or receive " from another person any article of merchandise other than " that actually sold to such purchaser, have been held to be " in violation of the fourteenth amendment to the Constitu- " tion of the United States. In other jurisdictions, such " statutes are upheld as valid. It has been held that the " business of a trading stamp company is not a process of " advertising the merchant with whom contracts are made " which will take it out of the operation of the police power, " and that the freedom of contract is not unconstitutionally " interfered with by the prohibition of the use of trading " stamps." 6 R. C. L., 211.

The cases cited as supporting the proposition last above stated are; "*In re* Gregory, 219 U. S., 210, 31 S. Ct., 143; 55 " U. S. (L. Ed.), 84; District of Columbia *vs.* Kraft, 35 " App. Cas. (D. C.), 253; 30 L. R. A. (N. S.), 957, and " note."

In the case of District of Columbia *vs.* Kraft (*supra*), Chief Justice Shepard delivered a most able and exhaustive opinion, in which the whole jurisprudence upon the subject of the trading stamp business is reviewed, reaching the conclusion as stated in the last paragraph of the foregoing excerpt. In the course of the opinion, he quotes, with approval, as follows, from a previous opinion, handed down by the same court, in the case of Lansburgh *vs.* District of Columbia, 11 App. D. C., 512, to wit:

"They" (the trading stamp concerns) "are not dealers in " ordinary merchandise, engaged in a legitimate attempt " to obtain purchasers for their goods by offering fair and " lawful inducements to trade. Their business is nothing " more or less than a cunning device. With no stock in " trade, but that device and the necessary books and stamps

"and so-called premiums, with which to operate it success-
"fully, they have intervened in the legitimate business car-
"ried on in the District of Columbia, between seller and
"buyer, not for the advantage of either, but, to prey upon
"both. They sell nothing to the person to whom they fur-
"nish the premiums. They pretend simply to act for his
"benefit and advantage by forcing their stamps upon a,
"perhaps, unwilling merchant * * *. The merchant
"who yields to their persuasion does so, partly in the hope
"of obtaining the customers of others, and partly through
"fear of losing his own, if he declines."

In his review of the different cases which are sometimes cited as supporting the contention that the trading stamp business is a legitimate business, and does not fall within the grasp of the police power, the learned Chief Justice finds that there are but few of them which touch the point here presented.

From a note appended to the case, it appears that the similar case of Columbia *vs.* Gregory (35 App. D. C., 271) was heard at the same time, and decided in the same way; that application was made to the Supreme Court of the United States for the review of the Kraft case, by *certiorari*, but that the writ was denied; and that, subsequently, Gregory applied for relief by *habeas corpus*, which writ was denied.

The note also refers to a Canadian case (Wilder *vs.* Montreal, Rap. Jud. Quebec, 26 C. S., 504),* in which, the provincial legislature having passed an act authorizing municipalities to prohibit the use of trading stamps, and the act having been upheld, the judgment sustaining it was reversed by the King's Bench, on the ground that the act was *ultra vires*, as impinging on the power of Parliament; whereupon, the Canadian Parliament passed an act, amend-

* Rapports Judiciaires Officiels of Quebec. Eng. Quebec Official Law Reports. (See also the note at the end of opinion in the *Wilder* case).

ing the Criminal law and declaring the trading stamp business illegal.

Recurring to the case under consideration, defendant's position is, that he is prevented by the State of Louisiana from following, within her territory (quoting, from the brief of his counsel, the language of the New York Court of Appeals, in People *vs.* Gillson), "such lawful industrial pursuits, not injurious to the community, as he may see fit," in that, he is prevented from issuing trading stamps, and he appeals to the Constitution of the United States, not, be it observed, on the ground that the State of Louisiana is using its taxing power in a case, in which, if the prevention can be applied at all, it should use its police power, but, on the ground, that the State is using its taxing power to stifle a pursuit that is not subject to the police power; a legitimate pursuit; a lawful, industrial, pursuit, not injurious to the community; a pursuit which the 14th Amendment guarantees that every citizen of the United States may follow, as of right, in every State in the Union, the people, constitution, statutes, and public policy of such State, notwithstanding to the contrary. If, then, the pursuit selected by defendant be not shown to be a lawful, industrial, pursuit, innocuous to the community, or broadly speaking, if it be not shown that his pursuit is beyond the reach of the police power of the State, he can take nothing by his plea, since his appeal to the 14th Amendment is based upon the alleged legitimacy and innocuousness of his pursuit, and, if he has failed to establish what he has alleged, and it appears that his pursuit is within the police power of the State, to regulate or prohibit, the question, whether the State has exercised that power in accordance with its own laws, is one of which the 14th Amendment will not take cognizance, provided, that which has been done might legally have been done in the exercise of that power.

Well, the State of Louisiana takes issue with the defendant on the question stated. Fifteen years ago, it enacted a statute,

entitled "An act making it a misdemeanor to issue trading stamps or other devices," which imposed penalties of fine and imprisonment upon any one who should engage in issuing trading stamps or who should deal with such persons. It is true that this Court decided that the act was unconstitutional, because the title was inadequate and misleading—the context going beyond the title—and it being found impossible to separate that which was, from that which was not, included. But, it served, nevertheless, as a declaration of the views of the people of the State, speaking through their law makers, and of the public policy of the State, concerning the trading stamp business. And the act of 1900, No. 35 (thus referred to) was followed, in 1904, by the act now under consideration, which was sustained by this Court, against an *attack* similar to that which defendant now makes, in the case of State *vs.* Merchant Trading Co., Ltd. (hereinbefore cited), and which, according to defendant's allegations, imposes a prohibitive tax on the business in question. Whatever others may think, therefore, it is fairly evident that the people of Louisiana have been, for fifteen years, of the opinion that the trading stamp business is not an industrial pursuit, working no harm to the community but, is a mere parasite, seeking to batten upon such pursuits, and that they have endeavored to make it unlawful and are now endeavoring to so tax it, as, at least, to discourage its development. Who, then, if the case be doubtful, should be the better able to determine whether the business is harmless or pernicious: the members of the Legislature upon whom that obligation is imposed, and who are fresh from the mass of the people, with whom the business of the defendant is transacted, or the Judges of the Courts, whose connections with the current affairs of life are more remote? The Courts have, no doubt, a duty to perform in the protection of the rights of the individual citizen; but, they have also a duty to perform in the protection of the rights of the mass of the citizens. The rule by which they should be

governed has, therefore, been deduced by the highest authority from all the cases, as follows:

"But, in all the cases, there is the constant admonition, "both in their rules and examples, that, when a statute is "assailed as offending against the highest guarantees of the "constitution it must clearly do so, to justify the Courts in "declaring it invalid." Eubank *vs.* Richmond, 226 U. S., 143; Ann. Cas. 1914, B. P. 194.

Bearing in mind the admonitions thus referred to, we are of opinion that the statute here attacked offends no guarantee invoked by defendant, of either the Constitution of the United States or of this State.

In the District of Columbia, where the paramount laws of the land are made and authoritatively construed, there has been in force, since February 17, 1873 (17 Stat. at L., 464, Ch. 148), a period exceeding forty years, and is now in force, an Act of Congress making it a penal offense to engage in any gift enterprise in that District, which act has been, and is now, applied to the trading stamp business, notwithstanding that it has been, time and again, attacked, upon the grounds here relied on by defendant, and notwithstanding that the Supreme Court of the United States has been, time and again, applied to for the reviewal and reversal of the rulings of the District of Columbia Court of Appeals, repelling such attacks; and, in view of those facts, we are further of opinion that, until the Supreme Court of the United States shall have decided to the contrary, there can be no sufficient reason, arising under the Constitution of the United States, why this Court, yielding its own convictions, should hold that the State of Louisiana may not adhere to, and enforce, its public policy with regard to the grave question of the rights of the individual considered with reference to the rights of the community, which is here put at issue.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled and avoided, and that

there now be judgment in favor of the State of Louisiana and against the defendant, Charles A. Underwood, in the sum of $5,000, with two per cent. per month, interest thereon from June 10, 1913, until paid, 10 per cent. as attorney's fees, upon the aggregate of said principal and interest, and recognition of a first lien and privilege, for the whole, upon all the property of the defendant, movable and immovable. It is further decreed that defendant be enjoined from the further conduct of the business in which he is engaged at 608 Canal Street, New Orleans, until the amount awarded by this judgment shall have been paid.

UNITED STATES OF AMERICA.
State of Louisiana:

SUPREME COURT OF THE STATE OF LOUISIANA.

I hereby certify the above and foregoing to be a true and correct copy of the opinion and judgment of the court handed down on the 18th day of October, A. D. 1915, in the case of State of Louisiana *vs.* Chas. A. Underwood or Southern Merchandise Exchange, No. 20,329. The judgment, however, has not yet become final, because the delay for filing an application for rehearing has not expired.

In witness whereof, I hereunto set my hand and affix the seal of the court aforesaid, at the city of New Orleans, this the 29th day of October, A. D. 1915.

[SEAL.] PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

[Endorsed:] No. 20,329. Supreme Court of the State of Louisiana. State of Louisiana *vs.* Chas. A. Underwood or Southern Merchandise Exchange. Appeal from the Civil District Court for the Parish of Orleans. No. 105,534. Certified Copy of Opinion and Judgment. Deposit $—. Amount of Costs $—.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

W. V. TANNER, as Attorney General of the State of Washington, GEORGE H. CRANDALL, Prosecuting Attorney of Spokane County, State of Washington, E. W. EVENSON, County Treasurer of Spokane County, State of Washington,
Plaintiffs in Error.

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and WILLIAM T. OATHOUT, doing business as Ryan & Oathout, JOSEPH SCHAICH, GEORGE D. PURVES, HAROLD L. BLAKE, ADOLPH RENSCH, WILLIAM P. STONE, ALBERT J. ZIV, WILLIAM E. THOMPSON, ABRAHAM H. GOLDBERG, ED. SCHIMMEL, MARIE C. J. BILLE, CARRIE M. NOERENBERG, LENA M. ROYCE, PEARL LAUNDRY COMPANY, a Corporation, CHAS. E. MARR, SAM LANGERT and SIDNEY KELLNER, Co-partners, LOUIS K. LEFEVRE and ELZA K. PEARSON, Co-partners,
Defendants in Error.

No. 595.

Motion to Advance Hearing of Cause

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF WASHINGTON.

W. V. TANNER,
Attorney General of the State of Washington,
Solicitor for Plaintiffs In Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

W. V. TANNER, as Attorney General of the State of Washington, GEORGE H. CRANDALL, Prosecuting Attorney of Spokane County, State of Washington, E. W. EVENSON, County Treasurer of Spokane County, State of Washington,
Plaintiffs in Error,

vs.

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Defendants in Error.

No. 595.

Motion to Advance Hearing of Cause

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF WASHINGTON.

Comes now W. V. Tanner, as Attorney General of the State of Washington, and moves the Court to advance from the docket, so that it can be heard as speedily as the business of this Court will permit, the

above entitled cause, wherein the plaintiffs in error, W. V. Tanner, as Attorney General of the State of Washington, George H. Crandall, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, as County Treasurer of Spokane County, State of Washington, are plaintiffs in error, and said John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, doing business as Ryan & Oathout, Joseph Schaich, George D. Purves, Harold L. Blake, Adolph Rensch, William P. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, Pearl Laundry Company, a Corporation, Chas. E. Marr, Sam Langert and Sidney Kellner, co-partners, Louis K. Lefevre and Elza K. Pearson, co-partners, are defendants in error, and respectfully represents:

That said cause is an action in equity begun by the defendants in error against the plaintiffs in error, in the United States District Court for the Eastern District of Washington, praying for an injunction against the defendants in error to prevent them and each of them from enforcing chapter 134, of the Laws of 1913, of the State of Washington, which chapter is as follows:

"AN ACT relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares

and merchandise, and providing a penalty for violation thereof.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

SECTION 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm, or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall

be used at no place other than that mentioned therein.

SECTION 3. No person, firm or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city or county in this state other than that in which such furnishing or selling shall take place.

SECTION 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

In their Amended Bill of Complaint, the defendants in error alleged that they were engaged in the mercantile business in Spokane County, Washington, their respective businesses including hardware, dry goods, laundry, retail tobacco, et cetera. They alleged that in their business they had been, and were, using tickets and coupons for advertising purposes, and for the purpose of giving cash discounts to their customers; that Chapter 134, of the Laws of 1913, of the State of Washington, above set forth, was in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it deprived the defendants in error and each of them, of liberty and property without due process of law, and denied them and each of them the equal protection of the law; that said act was unconstitutional and void, in that it conflicted with and nullified Section 3394, of the Revised Statutes of the Uni-

ted States, as amended by the tenth section of the Act of July 24, 1897, as further amended by the second section of the Act of July 1st, 1902, and that said Act of Congress was enacted as a means of carrying into effect the powers vested in the Federal government by Section VIII of the First Article of the Constitution of the United States. A temporary restraining order without notice was issued by the Court, enjoining the plaintiffs in error from enforcing the above Chapter, and after hearing on the rule to show cause, the Court filed a written opinion in which it held that the Chapter above mentioned was in conflict with the above provisions of the Fourteenth Amendment to the Constitution of the United States, and further, that it conflicted with similar provisions of the Constitution of the State of Washington.

Thereafter, the Court entered its final decree in said action, perpetually enjoining and restraining the defendants from enforcing said Act by any means whatsoever.

After this the above entitled action had been commenced, the Honorable John F. Murphy, as Prosecuting Attorney of King County, Washington, King County being in the Western Judicial District of the State of Washington, filed a criminal information in the Superior Court of the State of Washington for King County, against F. S. Pitney, charging him with a violation of the above Chapter. That action was

heard by the Supreme Court of the State of Washington on appeal thereto, and after hearing, the Court held that said Chapter 134, above mentioned did not conflict with any provision of the Constitution of the United States, and that it was in all respects valid. Said Pitney thereupon sued out a writ of error from this Court to the Supreme Court of the State of Washington, which writ was granted, and said cause is now pending in this Court numbered 618, entitled: "F. S. Pitney, Plaintiff in Error, against The State of Washington, Defendant in Error." Said action has not yet been heard or determined by this Court.

On the 21st day of August, 1913, Van Deman and Lewis Company, a corporation, and others, as plaintiffs, began an action in the United States District Court for the Southern District of Florida, against John W. Rast, Tax Collector for Duval County, Florida, and others, as defendants, to restrain the defendants from enforcing an act passed by the Legislature of the State of Florida in 1913, requiring, among other things, and in addition to other taxes, an annual State license tax of $500.00, and a County license tax of $250.00, from each and every person, firm or corporation offering with merchandise bargained or sold in the course of trade, any coupons, profit-sharing certificate, or other evidence of indebtedness or liability redeemable in premiums; that thereafter, after a hearing, and on the 23rd day of

October, 1913, said Court granted a temporary injunction restraining the enforcement of said Act, and thereupon the said defendants appealed from said order to the Supreme Court of the United States where said cause is now pending, numbered 318, entitled: "John W. Rast, Tax Collector for Duval County, State of Florida, et al., appellants, versus Van Deman and Lewis Company, et al., appellees." Said appeal has not been heard or determined by this Court.

That some of the questions involved in said appeal from the United States District Court for the Southern District of Florida are involved in said Pitney case above mentioned, numbered 618, and in this action as well; that in the ordinary course of business of this Court, said appeal from the United States District Court for the Southern District of Florida will be heard and determined before the two cases above mentioned, involving the constitutionality of the above act of the State of Washington, could be heard by this Court; that this petitioner desires to be heard, and to present the questions involved on behalf of the State of Washington, before a decision shall have been rendered on said Florida case above mentioned, and as soon as it is possible to present the same to this Court.

That a motion to advance the hearing of said Pitney case numbered 618, has been filed in the office of

the Clerk of this Court, and will be submitted to this Court at the same time this motion in this, the above entitled cause, shall be submitted to the Court.

WHEREFORE, your petitioner respectfully prays this Court to advance said Pitney case, and this, the above entitled cause, on the docket for hearing, so that they may be heard and determined by this Court at the same time it shall hear and determine said Florida case numbered 318, as aforesaid.

Respectfully submitted,

.....

Attorney General of the State of Washington,

Solicitor for Plaintiffs in Error.

IN THE

Supreme Court of the United States

October Term, 1914

W. V. TANNER, as Attorney General of the State of Washington, GEORGE H. CRANDALL, Prosecuting Attorney of Spokane County, State of Washington, E. W. EVENSON, County Treasurer of Spokane County, State of Washington,

Plaintiffs in Error.

v.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN, and WILLIAM T. OATHOUT, doing business as Ryan & Oathout, JOSEPH SCHAICH, GEORGE D. PURVES, HAROLD L. BLAKE, ADOLPH RENSCH, WILLIAM P. STONE, ALBERT J. ZIV, WILLIAM E. THOMPSON, ABRAHAM H. GOLDBERG, ED. SCHIMMEL, MARIE C. J. BILLE, CARRIE M. NOERENBERG, LENA M. ROYCE, PEARL LAUNDRY COMPANY, a Corporation, CHAS. E. MARR, SAM LANGERT and SIDNEY KELLNER, Co-partners, LOUIS K. LEFEVRE and ELZA K. PEARSON, Co-partners,

Defendants in Error.

No. 595

STIPULATION FOR SUBMISSION OF MOTION TO ADVANCE WITHOUT NOTICE.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiffs in error and the defendants in error, by their respective solicitors that, the defendants in error may present the foregoing motion to advance the hearing of the above entitled cause without other or further notice to the defendants in error,

and that the defendants in error and each of them do hereby waive notice of the submission of said motion to advance.

Dated at Seattle, Washington, this.....day of December, 1914.

.....

Attorney General of the State of Washington, and Solicitor for Plaintiffs in Error.

.....

Solicitor for Defendants in Error.

FILED
APR 14 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

W. V. TANNER, as Attorney General of the State of Washington; GEORGE H. CRANDALL, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. EVENSON, as County Treasurer of Spokane County, State of Washington,

Appellants,

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, doing business as RYAN & OATHOUT, *et al.*

Appellees.

No. [redacted] 22

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLANTS.

W. V. TANNER,
Attorney General of the State of Washington,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

W. V. TANNER, as Attorney General of the State of Washington; GEORGE H. CRANDALL, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. EVENSON, as County Treasurer of Spokane County, State of Washington,

Appellants,

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, doing business as RYAN & OATHOUT, *et al.*

Appellees.

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W. V. TANNER,
Attorney General of the State of Washington,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

W. V. TANNER, as Attorney General of the State of Washington; GEORGE H. CRANDALL, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. EVENSON, as County Treasurer of Spokane County, State of Washington,

Appellants,

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, doing business as RYAN & OATHOUT, *et al.*

Appellees.

No. 595.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This appeal is from a decree rendered by the United States District Court for the Eastern District of Washington, Northern Division, against the ap-

pellants above named, perpetually enjoining and restraining them from enforcing the provisions of what is known as the Trading Stamp Act of the State of Washington, the same being Chapter 134 of the Laws of the State of Washington for the year 1913, which act is as follows:

"AN ACT relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares or merchandise, and providing a penalty for violation thereof, as follows:

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards or other similar devices, shall before so furnishing, selling or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

SEC. 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treas-

urer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

SEC. 3. No person, firm, or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any such stamps, coupons, tickets, certificates, cards or other similar devices for use in any town or county in this state other than that in which such furnishing or selling shall take place.

SEC. 4. Any person, firm or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor.

Passed the House March 4, 1913.

Passed the Senate March 12, 1913.

Approved by the Governor March 20, 1913."

(General Laws of Washington, 1913, page 413, Remington & Ballinger's 1913 Supplemental Codes and Statutes, section 7069-1 to 7069-4; Record, page 4.)

The trading stamp business is an ingenious scheme by which a large number of parties engaged in it have been able to levy tribute on business generally, to the cost of the manufacturer and the consumer alike, without yielding any substantial return. These parties sell these trading stamps to merchants at a very handsome profit, and the merchant then gives

to each cash purchaser a stamp of a denomination equivalent to the amount of the purchase. When a certain number of these stamps have been accumulated, they can be presented to the trading stamp people for redemption in articles of furniture, jewelry, etc., which in the end develop to be of little or no value. The only effect of the transaction is to increase the cost of the necessaries of life to the ultimate consumer, because, of course, the consumer eventually must pay the added expense of the merchant in doing business.

Appellees contended in their bill that the act violated the Fourteenth Amendment to the Constitution of the United States, and the District Court, on the hearing of a motion for a temporary injunction, held the act unconstitutional, and later perpetually enjoined its enforcement.

ASSIGNMENT OF ERRORS.

The Court erred:

1. In failing to dismiss the action.

2. In enjoining the enforcement of the statute.

3. In holding the act in contravention of the Fourteenth Amendment to the Constitution of the United States.

These assignments of error naturally resolve themselves into the following propositions, under which the case will be discussed, viz.:

(1) The act is not an arbitrary classification.

(2) If the state possesses the power to tax for revenue, the extent of its exercise of that power is immaterial.

(3) The state may prohibit the use of trading stamps by virtue of the police power.

At this point we desire to call attention to the fact that subsequent to the entry of the decree in this case, the Supreme Court of the state upheld the act.

State v. Pitney, 79 Wash. 608.

The Court will observe that the appellees are merchants using trading stamps in their business. They, therefore, have no legal interest in the question of the right of any one to sell stamps to merchants. This

proposition has been so often asserted by this court, that an extended citation of authority is unnecessary.

Albany County v. Stanley, 105 U. S. 305;
Turpin v. Lemon, 187 U. S. 51;
Iroquois Transportation Co. v. Company, 205 U. S. 353;
Patsone v. Pennsylvania, 233 U. S. 138.

ARGUMENT.

The Act Is Not an Arbitrary Classification.

The lower court placed its decision on the grounds that the act violated the equal protection clause of the Fourteenth Amendment of the Federal Constitution, citing as authority therefor *Barbier v. Connolly,* 113 U. S. 27, and *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540. In view of the fact that the lower court held the act was arbitrary selection, this court will pardon us, we trust, if we call its attention to a number of decisions upholding statutes against similar contentions.

It may be stated without fear of contradiction that an act does not deny the equal protection of the law because not every person within the geographical limits of the state is subject to the act; that the equality of operation required by the equal protection clause of the constitution does not mean indiscriminate operation on persons merely as such, but on persons according to their relation; that before an act can be said to deny the equal protection of the law, it must appear that the classification made is palpably arbitrary and that there is no fair reason for the law that would not require, with equal force, its extension to others whom it leaves untouched.

In the case of *Missouri Pacific Ry. Co. v. Mackey,* 127 U. S. 205-209, this court, in speaking of said legislation, said:

"Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

In the case of *Magoon v. Illinois Trust & Savings Bank,* 170 U. S. 283, 293, this court, speaking of the equal protection clause, said:

"The rule, therefore, is not a substitute for municipal law; it only prescribed that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation."

In the case of *Quong Wing v. Kerkendall,* 223 U. S. 59, 62, this court said:

"A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, *even a policy with which we might disagree. McLean v. Arkansas,* 211 U. S. 539, 547, 29 Sup. Ct. Rep. 206; *Armour Packing Co. v. Lacy,* 200 U. S. 226, 235, 26 Sup. Ct. Rep. 232; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 562, 22 Sup. Ct. Rep. 431. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *Amer. Sugar Ref. Co. v. Louisiana,* 179 U. S. 89, 92, 95, 21 Sup. Ct. Rep. 43; *Williams v. Fears,* 179 U. S. 270, 276, 21 Sup. Ct. Rep. 128; *W.*

W. Cargill Co. v. Minnesota, 180 U. S. 452, 469, 21 Sup. Ct. Rep. 423. It may favor or discourage the liquor traffic or trusts. The criminal law is a whole body of policy on which states may and do differ. If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair. And if, again, it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller v. Oregon,* 208 U. S. 412, 28 Sup. Ct. Rep. 324. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, *the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference.* The particular points at which that difference shall be emphasized by legislation are largely in the power of the state." (Italics ours.)

In the case of *Mutual Loan Co. v. Martell,* 222 U. S. 235, this court said:

"We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion."

In the case of *Lindsey v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78, this court said:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: (1) The equal protection clause of the Four-

teenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) *When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.* (4) *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.*" (Italics ours.)

In the case of *Barrett v. Indiana*, 229 U. S. 26, 29, this court said:

"It is argued that the act in question is also violative of the equal protection clause of the Fourteenth Amendment, in that it applies to bituminous coal mines, but not to block coal mines. The equal protection of the law requires laws of like application to all similarly situated; but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make the laws, and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification, and before a court can interfere with the exercise of its judgment, it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.'"

In the case of *Jeffrey Mfg. Co. v. Blagg,* decided January 5, 1915, this court said:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley v. Carbonic Gas Co.,* 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws, from the generality of their application, necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject-matter of its laws, what shall come within them, and what shall be excluded."

In the case of *Postal Telegraph Co. v. Charleston,* 153 U. S. 692, this court upheld an ordinance imposing a tax of $500.00 per year upon telegraph companies on the basis of business done exclusively within the City of Charleston, although it imposed no similar tax upon any other business.

In the case of *Pacific Express Co. v. Seivert,* 142 U. S. 339, this court sustained an act imposing a tax upon the business of express companies, and exempting therefrom railroad and steamboat companies which carried express matter.

In the case of *Charlotte Columbia & Augusta R. R. Co. v. Gibbs,* 142 U. S. 386, this court sustained an

act requiring railroads to pay the services of railroad commissioners, and in so doing held that whether the costs should be thrown entirely upon the railroads or upon the state, or be apportioned between them, was a matter of legislative discretion.

In the case of *Central Loan & Trust Co. v. Campbell Commission Co.,* 173 U. S. 84, this court sustained an act which required a bond as a condition precedent to a non-resident securing a writ of attachment, but required no bond under similar circumstances of a resident.

In the case of *Clark v. Kansas City,* 176 U. S. 114, this court sustained an act empowering cities to annex lands, but exempting therefrom agricultural lands.

In the case of *Erb v. Morasch,* 177 U. S. 584, this court sustained an ordinance limiting the speed of railroad trains within a city, but exempting therefrom dummy railroads operated by steam and electric railroads.

In the case of *Gundling v. Chicago,* 177 U. S. 183, this court sustained an ordinance requiring persons selling cigarettes in the city of Chicago to secure a license, although other occupations were not subject to a license tax.

In the case of *American Sugar Refining Co. v. Louisiana,* 179 U. S. 88, this court sustained an act

imposing a license tax upon manufacturers engaged in the business of refining sugar, but exempting from the tax those who refined the products of their own plantations.

In the case of *Williams v. Fears,* 179 U. S. 270, this court sustained an act which imposed a license fee upon agents hiring persons to labor outside of the state, but exempting therefrom persons hiring laborers to work within the state.

In the case of *Clark v. Titusville,* 184 U. S. 329, this court sustained an ordinance imposing a license tax upon merchants of a city by which they were divided into classes wholly and solely according to the amount of their sales, each class paying a different rate of tax.

In the case of *Consolidated Collection Co. of St. Louis v. Illinois,* 185 U. S. 203, the court sustained an act creating the office of mine inspector and authorizing him to determine the number of times each mine should be inspected, to regulate the charges therefor, and compelling the owner to pay the same, but exempting therefrom coal mines where not more than five men were employed at any one time.

In the case of *Fidelity Mutual Life Association v. Mettler,* 185 U. S. 308, this court sustained an act imposing a liability of 12 per cent. damages, and reasonable attorney's fees, upon life or health insurance

companies, but not upon any other person or company, declining to pay a liability when the same was due.

In the case of *Travelers Insurance Company v. Connecticut,* 185 U. S. 364, the court sustained an act providing for the assessment of corporate stock held by non-residents with no deduction on account of real estate held by the corporation, although provision for such deduction was made in assessing resident stockholders.

In the case of *Otis v. Parker,* 187 U. S. 606, the court sustained an act avoiding all contracts for the sale of shares of corporate stock on margin, although the provision operated equally against *bona fide* transactions as well as gambling contracts, and did not affect any other sales on margin.

In the case of *Farmers & Merchants Ins. Co. v. Dobney,* 189 U. S. 301, the court sustained an act which provided a reasonable attorney's fee for plaintiff in case of an unsuccessful defense by an insurance company, but making no similar imposition in case of any unsuccessful defense by other parties to actions.

In the case of *Cincinnati Street Ry. Co. v. Snell,* 193 U. S. 30, the court sustained an act providing that where the opposite party to an action was a corporation with more than fifty stockholders, having

its principal office or transacting its principal business in the county in which the action was pending, a change of venue might be had on the application of the party not such corporation, without conferring a similar right on the corporation.

In the case of *Rippey v. Texas,* 193 U. S. 504, the court sustained an act which made a majority vote in favor of the prohibition of the liquor traffic in a county or precinct a bar to the re-submission of the question to the voters of any political subdivision thereof until after prohibition had been defeated at a subsequent election in the entire county or precinct, while the failure to carry prohibition in a county was not made a bar to the immediate submission of the question to the voters of its political subdivisions, and the corresponding failure in a town or city was made no bar to the immediate submission of the question to the voters of the larger territory.

In the case of *Missouri, K. & T. Ry. Co. v. May,* 194 U. S. 267, the court sustained an act imposing a penalty upon railway companies alone for allowing Johnson grass or Russian thistle to mature and go to seed on their land.

In the case of *Savannah, T. & I. etc. v. Savannah,* 198 U. S. 392, the court sustained an act imposing a tax upon a street railway company at the rate of $100.00 per mile, or fraction thereof, and exempting steam railways from the same.

In the case of *Kehrer v. Stewart,* 197 U. S. 60, 69, the court sustained an act imposing upon all agents of packing houses doing business in the state $200.00 in each county where the business was carried on, and in so doing said:

"What the necessity is for such a tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

In the case of *Minnesota Iron Co. v. Kline,* 199 U. S. 593, the court sustained an act abrogating the fellow servant rule in actions against railroad companies, but excepting therefrom actions for injuries while the plaintiff was engaged in the construction of a new road or any part thereof not open to public travel or use.

In the case of *Bacon v. Walker,* 204 U. S. 311, the court sustained an act permitting the recovery of damages from an owner of sheep for permitting them to graze on the public domain within two miles of a dwelling house, but imposing no such liability on the owner of any other stock so grazing.

In the case of *Wilmington Star Mining Co. v. Fulton,* 205 U. S. 60, the court sustained an act which required mine owners to employ as managers only those who had been licensed by the state, and making

the mine owner responsible for any act of negligence of such manager, although it imposed no similar burden upon any other employer of labor.

In the case of *Ozan Lumber Co. v. Union County National Bank,* 207 U. S. 251, the court sustained an act exempting merchants and dealers who sold patented articles in the usual course of business from a provision thereof requiring a negotiable instrument taken in payment for a patented article to show on its face for what it was given or be void.

In the case of *McLean v. Arkansas,* 211 U. S. 539, the court sustained an act by which miners employed at quantity rates were prevented from contracting for wages upon the basis of screened coal instead of the weight of coal as originally mined, but exempting therefrom mines not employing ten or more men.

In the case of *Williams v. Arkansas,* 217 U. S. 79, the court sustained an act prohibiting proprietors of hotels, lodging houses, eating houses, bath houses, and physicians, masseurs, surgeons or other medical practitioners, only, from drumming or soliciting business or patronage on railway trains within the state.

In the case of *Southwestern Oil Co. v. Texas,* 217 U. S. 114, the court sustained an act imposing an occupation tax on wholesale dealers in oil, but which did not exact a similar tax from wholesalers in other articles.

In the case of *Western Union Telegraph Company v. Commercial Milling Company,* 218 U. S. 406, the court sustained an act by which a telegraph company was prohibited from limiting its liability for its negligent failure to deliver a telegram addressed to a person in another state, although railroad and express companies were permitted to limit their liability for their negligence.

In the case of *Assaria State Bank v. Dooley,* 219 U. S. 121, the court sustained an act which preferred depositors in a failing bank over other creditors.

In the case of *Engel v. O'Malley,* 219 U. S. 128, the court sustained an act forbidding individuals or partnerships to engage in the business of receiving deposits of money for safekeeping, or for the purpose of transmission to another or for any purpose without a license, but exempting therefrom hotel keepers, express or telegraph companies, individuals, or partnerships, where the average amount of each sum received on deposit or for transmission in the ordinary course of business should not exceed $500.00 during the preceding fiscal year, or an individual or partnership filing a bond approved by the comptroller for $100,000.00 when the business was in a city having 1,000,000 inhabitants, or if elsewhere for $50,000.00.

In the case of *Broadnax v. Missouri,* 219 U. S. 285, the court sustained an act imposing a stamp tax upon

sales of corporate stocks and bonds, grains, provisions, and other commodities where bought for future delivery, but imposing no tax upon other businesses.

In the case of *Chicago, Rock Island and Pacific Ry. v. Arkansas*, 219 U. S. 453, the court sustained an act prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, but exempting railroads of less than fifty miles in length.

In the case of *Mutual Loan Co. v. Martell*, 222 U. S. 225, the court sustained an act making invalid against the employer assignments of, or order for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by the written consent of the wife of the employe, but exempting therefrom national banks and banks under the supervision of the bank commissioner, and certain loan companies.

In the case of *Quong Wing v. Kirkendall*, 223 U. S. 59, the court sustained an act imposing a license fee upon laundries, but exempting therefrom steam laundries and laundries run by women where not more than two women were employed.

In the case of *Murphy v. California*, 225 U. S. 623, the court sustained an ordinance prohibiting the keeping of billiard or pool tables for hire or public use, but permitting hotel keepers to maintain a bil-

liard or pool room in which their regular and registered guests might play.

In the case of *Barrett v. Indiana*, 229 U. S. 26, this court sustained an act requiring entries in coal mines to have an unobstructed space of at least two feet outside of the rails leading therein, but exempting from the operation of the act block coal mines.

In the case of *Metropolis Theater Company v. Chicago*, 228 U. S. 61, the court sustained an ordinance classifying theaters for license on the basis of the highest priced seats, other than box seats, irrespective of the revenue collected by the respective theaters. That case being one of the last decisions on this point, the following language from the opinion is instructive:

"In other words, there is a natural relation between the price of admission and revenue, some advantage, certainly, that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial; and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as that amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. *To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppres-*

sive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations —illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy." (Italics ours.)

In the case of *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, this court upheld an act prohibiting any one engaged in the production, manufacture or distribution of any commodity in general use, engaged in business in two or more places in the state, from selling any commodity at different prices for the purpose of destroying competition, and in so doing said:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

In the case of *Clement National Bank v. Vermont*, 231 U. S. 120, this court upheld a statute imposing a tax upon interest-bearing deposits in national banks, but exempting depositors from the payment of the tax on all sums to $2,000.00.

In *Sturgis & Burm Mfg. Co. v. Beauchamp,* 231 U. S. 320, this court upheld an act prohibiting the employment of children under the age of sixteen years in hazardous occupations, but not prohibiting them from employment in all occupations.

In *Patsone v. Pennsylvania,* 232 U. S. 138, this court upheld an act prohibiting the killing of any wild bird or animal by any unnaturalized, foreign-born resident of Pennsylvania, except in defense of person or property, and, in order to make the act effective, made it unlawful for any such person to own or be possessed of a shotgun or rifle. In upholding the act, the court said:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley v. National Carbonic Gas Co.,* 220 U. S. 61, 80, 81. The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 160; *Rosenthal v. New York,* 226 U. S. 260, 270; *L'Hote v. New Orleans,* 177 U. S. 587.

The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. *Barrett v. Indiana,* 229 U. S. 26, 29.

"Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts. *Adams v. Milwaukee,* 228 U. S. 572, 583. If we might trust popular speech in some states it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong. See *Trageser v. Gray,* 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; *Com. v. Hana,* 195 Mass. 262, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514."

In the case of *Farmers & Mechanics Savings Bank of Minneapolis v. Minnesota,* 232 U. S. 516, this court upheld an act requiring savings banks to include in the computation of their assets for taxation notes secured by mortgage upon Minnesota real estate upon which the registration tax had been paid, but relieving mortgages upon such real estate when otherwise owned from all taxation except the registration tax.

In the case of *Ohio River & Western Ry. Co. v. Dittey,* 232 U. S. 576, this court upheld an excise tax imposed upon gross earnings of railroad companies doing business in Ohio, although the act did not include all other public utilities carrying on business within the state, and did not tax all utilities at the same rate the railroads were taxed.

In the case of *Baccus v. Louisiana,* 232 U. S. 334, this court upheld an act prohibiting the sale by itinerant venders of any drug, nostrum, ointment, or application of any kind intended for the treatment of disease or injury, although the sale of such articles by other persons was permitted.

In the case of *Singer Sewing Machine Co. v. Brickell,* 233 U. S. 304, this court sustained an act requiring a license tax upon the business of selling or delivering sewing machines, but exempting therefrom merchants selling sewing machines at their regularly established places of business.

In the case of *Erie R. R. Co. v. Williams,* 233 U. S. 685, this court upheld an act requiring railroad companies to pay their employes semi-monthly, but exempting from the act other public service corporations.

In the case of *Atlantic Coast Line R. R. Co. v. Georgia,* 234 U. S. 280, this court upheld an act requiring railway locomotives running on the main line to be equipped with electric headlights, excluding therefrom tram roads, mill roads, and roads engaged principally in lumber or logging transportation in connection with mills.

In the case of *Keokee Consolidated Coke Co. v. Taylor,* 234 U. S. 224, this court upheld an act forbidding persons, firms or corporations engaged in

mining and manufacturing to issue store orders for the payment of labor, not purporting to be redeemable in money, but the act did not prohibit other persons, firms or corporations from so doing.

In the case of *International Harvester Co. of America v. Missouri,* 234 U. S. 199, this court upheld an act prohibiting manufacturers and venders of articles from combining to lessen competition and regulate prices, although the act permitted such combinations among purchasers thereof, as well as wage earners, etc.

Despite all these decisions, applicable to almost every conceivable state of facts, the district court held the act in question was arbitrary classification, citing as authority therefor *Barbier v. Connolly,* 113 U. S. 27, and *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540. The court quoted from the *Barbier* case that portion of the opinion in which this court spoke in general terms of the equal protection clause, but following what was quoted by the district court this court continued as follows:

"But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special char-

acter, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

Furthermore, it will be observed that the *Barbier* case has not been regarded by this court as an authority warranting it in holding unduly discriminative classifications far more extreme than that in the case at bar, although they were founded on less cogent reasons. In the *Connolly* case the doctrine was applied by this court with surprising strictness, but we observe that that case has not been deemed authority sufficient to support claims since made of a denial of the equal protection of the law. No contradiction need be feared, we apprehend, of the statement that in the last ten years more extreme legislation passed by Congress and the various state legislatures has

been considered by this court than in the remaining period of the court's existence. In an article entitled, "Problems of Police Power," by Ernest Freund, the author of "Freund on Police Power," appearing in Vol. 20, No. 5, page 301, of "Case & Comment" (October, 1913, issue), a monthly legal journal published by the Lawyers Co-Operative Publishing Company, that eminent author called attention to the fact that in ten years this court had not declared a single police measure invalid by reason of violation of the equal protection clause. In this connection he said:

"The equal protection clause of the Fourteenth Amendment will, of course, be thought of at once as a possible weapon of defense against unwarranted legislation. However, a study of the operation of this clause in the past must produce considerable skepticism as to its availability in the future. There are some states in which it plays a considerable part in the judicial overthrow of statutes, and Illinois is conspicuous in this respect. In that state, however, the application of the rule of non-discrimination has been so capricious that the impossibility of fortelling what kind of classification for purposes of welfare legislation will stand the test of judicial scrutiny has become a notorious grievance. The Supreme Court of the United States, on the other hand, having applied the rule in one case (that of anti-trust act of Illinois, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540) with surprising strictness, has since practically taken the position that a legislative classification will be sustained if there is any reasonable possibility of its justification and *in the last ten years no measure has been declared invalid by reason of undue partiality or discrimination.* No jurisdiction

has developed any constructive theory of classification which might serve for guidance or protection.

The reason for this failure is tolerably clear. The legitimacy or illegitimacy of classification can be established only on the basis of social or economic data of great complexity. It presents a question of fact for the examination of which the courts are not equipped. It is always a condition as well as a theory which underlies public welfare legislation; and while the courts can deal adequately with the theory, the condition must elude them unless it is notorious, and at present the causes of social or economic grievances are rarely notorious." (Italics ours.)

Since that time this court has decided the case of *Smith v. Texas* (*supra*), 233 U. S. 630, in which it held violative of the equal protection clause an act passed by the legislature of Texas making it a misdemeanor for any person to act as a conductor on a railway train in that state without having previously served for two years as a freight conductor or brakeman. The court found the purpose of the act, viz., protection to the public, etc., a legitimate one, but condemned the limited means by which competency and ability might be acquired or established. In short, the court held that, in view of the purpose of the act, a further provision arbitrarily limiting a proper showing of ability to service as a brakeman or conductor, and the exclusion of all other proper training, arbitrary and violative of the equal protection clause. We believe that case is the only one in which this court has sustained the claim of a denial of the equal

protection of the law in any case decided by it in the last ten years in which police power acts were attacked on that ground. It seems difficult for us to believe that the decision of the district court in the case at bar is sound.

Just two reasons are assigned by the appellees for their contention, viz., that the use of coupons and trading stamps is an advertising scheme, and that it is a means by which cash discounts are given. They say that advertising by means other than trading stamps or coupons is precisely the same as the advertising scheme used by them. If it be meant thereby that advertising by means of coupons or trading stamps, if such be advertising, and advertising in newspapers or by bill-boards, circulars, etc., is one and the same thing, and that a classification on that basis is invalid, then, we submit, the contention is its own answer. Furthermore, the contention that the giving of a cash discount, if such it be, by means of trading stamps and coupons which are redeemable when a certain number have been accumulated, and the giving of a cash discount in money at the time of the purchase and with each purchase, is the same thing, and affords no ground of classification, again we submit that the contention is its own answer. Appellees will not question the fact, we presume, that there is something in the use of trading stamps or

coupons which makes some business men adopt them. It is difficult to understand, therefore, why it is contended that the legislature could not use the difference in the means of advertising, or of a giving of a cash discount, as a basis of governmental action. In the case of *Metropolis Theatre Co. v. Chicago,* 228 U. S. 61, that precise question was before this court, and in sustaining an ordinance classifying theatres for license on the basis of the highest priced seats, other than box seats, irrespective of the revenue collected by the respective theatres, this court said:

"In other words, there is a natural relation between the price of admission and revenue, some advantage, certainly, that determines the choice. The distinction obtains in every large city of the country. The reason for it must, therefore, be substantial; and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as a basis of governmental action."

In the case of *Wheeler v. Sohmer,* 233 U. S. 434, this court upheld an act passed by the legislature of New York imposing a tax upon negotiable instruments "when the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death." In that opinion, this court said:

"It would be an extraordinary deduction from the Fourteenth Amendment to deny the power of the state to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law."

If the use of coupons and trading stamps is a means of advertising, or a means of giving cash discounts, there must be some reason which governs the choice between it and other means of advertising or giving a cash discount in cash at the time of each separate purchase. In the light of the foregoing authority, we submit that this reason, this choice of means, and this system of doing that business as distinguished from all others, may be used by the legislature as a basis of governmental action without denying to the appellees the equal protection of the law.

In the case of *Nicol v. Ames*, 173 U. S. 509, this court had under consideration the constitutionality of an act of Congress of June 13, 1898, levying a war tax, and the particular provision thereof making it a crime to fail to affix stamps on a memorandum of sale to a board of trade. The act was attacked on the ground that it was not uniform. The court upheld the act, and in so doing said:

"In searching for proper subjects of taxation to raise moneys for the support of the government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities and one where such facilities are not availed of

by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on."

Again:

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. A sale at an exchange differs from a sale made at man's private office, or on his farm, or by a partnership, because, although the subject-matter of the same may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might and probably would occupy a great deal of time in finding a customer, bringing him to the spot, and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilties for accom-

plishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not.

"In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilties offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who makes sales of the same kind of things, whether at an exchange or elsewhere."

If the use of trading stamps or coupons is a means of advertising or a means of giving cash discounts, there must be some reason which governs the choice between it and other means of advertising or giving a cash discount in cash at the time of each separate purchase. In the light of the foregoing authority, we submit that this reason, this choice of means, and this system of doing that business as distinguished from all others, may be used by the legislature as a basis of governmental action without denying to the appellees the equal protection of the law.

Although we believe the foregoing decisions of this court foreclose appellees' contention that this act violates the equal protection clause of the Fourteenth Amendment, it may not be amiss to call attention to decisions on the direct point. In the case of *Fleetwood v. Read,* 21 Wash. 547, the Supreme Court of Washington upheld against similar attack an ordi-

nance requiring every person, firm or corporation within the city of Tacoma using coupons and trading stamps such as are used by the appellees, to pay a license fee of $100.00 for the privilege of using the same.

In the case of *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, the same court upheld a similar ordinance.

In the case of *State v. Pitney*, 79 Wash. 608, the same court held this very act constitutional on all grounds urged, including a claim of violation of the equal protection clause.

In the case of *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, the United States Circuit Court of Appeals for the Fourth Circuit upheld an act passed by the legislature of West Virginia imposing a tax upon persons or incorporations engaged in the trading stamp business, the tax being $500.00 for each county in which such business was carried on.

In the case of *Ex Parte McKenna*, 126 Calif. 429, the Supreme Court of California held that a license tax could be lawfully imposed upon persons, firms or corporations furnishing trading stamps to merchants.

In the case of *Sperry & Hutchinson Co. v. Melton*, (W. Va.), 71 S. E. 19, the Supreme Court of Appeals of West Virginia expressly held that the legislature

had power to select and tax the business of issuing and redeeming trading stamps, and that such act did not violate any provision of the Fourteenth Amendment to the Federal constitution.

In the case of *Sperry & Hutchinson Co. v. Owensboro*, 151 Ky. 389, the Court of Appeals of Kentucky upheld, as against similar attack, a statute of that state imposing a license fee of $300.00 upon persons, firms or corporations engaged in furnishing trading stamps to merchants.

The court will observe that the act in question applies equally and without exception to all parties giving coupons, tickets, stamps, etc., with a sale. It contains no exemption in express terms, nor are there any in its practical application. It is a case in which the doing of a certain thing, without securing a license, is prohibited throughout the state of Washington. The act, in fact, makes no classification.

If, however, this court shall be of the opinion that a classification is made by the act, then we submit that it is not arbitrary selection, and that the act does not deny the equal protection of the law.

The right to tax is one of the attributes of sovereignty; it is a right inherent in each of the states. The right of the state to require the payment of a tax, whether in the form of a license fee or otherwise, for the purpose of regulation and revenue, as a condi-

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IF THE STATE POSSESSES THE POWER TO TAX FOR REVENUE, THE EXTENT OF THE EXERCISE OF THAT POWER IS IMMATERIAL.

tion precedent to the right to follow the various trades and professions, or to do any business of any kind, cannot be questioned, and is a legitimate exercise of such power.

Nathen v. Louisiana, 8 How. 73, 80;
Welton v. Missouri, 91 U. S. 275;
Ficklen v. Taxing District, 145 U. S. 1, 21;
Emert v. Missouri, 156 U. S. 296;
American Sugar Refining Co. v. Louisiana, 179 U. S. 88, 94;
Kehrer v. Stewart, 197 U. S. 60, 69;
Bradley v. Richmond, 227 U. S. 477;
Fleetwood v. Read, 21 Wash. 547, 552;
Stull v. DeMattos, 23 Wash. 71;
In re Garfinkle, 37 Wash. 650;
McKnight v. Hodge, 55 Wash. 289;
Sperry & Hutchinson Co. v. Tacoma, 68 Wash. 254;
State v. Pitney, 79 Wash. 608.

In the case of *Ficklen v. Taxing District* (*supra*), 145 U. S. 1, 21, this court said:

"No doubt can be entertained of the right of a state and legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard."

In the case of *Emert v. Missouri* (*supra*), 156 U. S. 296, this court sustained a statute requiring every peddler to procure a license and to pay a tax therefor. In the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, this court, in speaking of its decision

in the Emert case, and what in fact had been taxed by the statute there upheld, said:

"It was the privilege of selling *in a particular way*, as a peddler, which was licensed in the *Emert* case." (Italics ours.)

In the case of *Kehrer v. Stewart (supra)*, 197 U. S. 60, 68, this court upheld an act imposing a tax upon all agents of packing houses doing business in this state, $200.00 in each county where said business is carried on, and in so doing said:

"What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

In the case of *Bradley v. Richmond (supra)*, 227 U. S. 477, this court sustained a taxing act requiring each member of thirteen classes of professions and vocations to pay a license fee, which ranged, according to class, from $10.00 to $800.00, and in so doing said:

"The tax imposed is not merely an exercise of the police power regulating a business, but is a tax assessed as a condition upon which the license issues. Though it fulfills the double function of both regulating the business and producing revenue, it was fully authorized by the law of the state, as adjudged by the very judgment under review. *Gundling v. Chicago*, 177 U. S. 183, 189, 20 Sup. Ct. Rep. 633. Since the purpose of the statute is double, it is plain that to

exact the same amount from each person or firm subject to the tax might result in inequality of burden under like circumstances and conditions. Therefore it was that the ordinance provided for a division into classes, those in each class paying the same tax."

These principles obtaining, it is necessary only to inquire as to the power of the legislature of the state of Washington to levy the tax imposed by this act. In the case of *Fleetwood v. Read (supra)*, 21 Wash. 547, 555, the Supreme Court of Washington, in upholding an ordinance taxing merchants using trading stamps, said:

"It is boldly asserted, however, by the respondent that under the power granted by the legislature not only is the city authorized to pass ordinances controlling the exercise of the police power, but it is authorized to pass ordinances for the purpose of raising revenue only. The law which authorized this ordinance, if it is authorized, is subdivsion 33, of Sec. 739, Bal. Code, and is as follows:

" 'To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same.'

"This provision is in relation to cities of the first class. We do not think the restricted interpretation urged by the appellant can be placed upon this statute. The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes, subdivision 10 of Sec. 938, the act in regard to general powers of the cities of the third class, authorizes the city to license, for the purpose of regulation and revenue, all and every kind of busi-

ness; and subdivision 10 of Sec. 1011, in defining the powers of cities of the fourth class, provides that the city shall have power to license, for the purpose of regulation and revenue, all and every kind of business. And so the power to license for purposes of revenue is especially granted to all the other classes of cities. But we do not think that the authorization in this respect of cities of the other classes is any stronger than the authorization of cities of the first class, where the power is to grant licenses for any lawful purpose, which must be held to include purposes embraced in the provisions in relation to the other cities; and, taking into consideration the whole scope of the legislative provisions in this state, as well as the language especially used in relation to cities of the first class, we think it is plain that no discrimination was intended by the legislature. The legislature probably intended by this sweeping and comprehensive provision to put at rest any legal questions which might be raised by an attempt to specify particularly the powers conferred, or the particular subjects falling within the general provision,—questions which are frequently raised under the rule that the expression of one thing excludes the others. It is true, as stated by appellant, that the language used, viz., 'and provide for revoking the same,' may seem to be a little awkward and unnecessary in this connection. Still, a case might be conceived where it would be necessary to revoke a license even where the object of the license was to obtain revenue. But, in any event, the intervention of this seemingly unnecessary provision would not be sufficient to destroy the interpretation which, it seems to us, the broad language of the statute thoroughly warrants. We have examined all of the cases cited by the appellant, but, with the exception of one or two, they do not seem to us to be in point, and those, we think, do not express the established and almost uniform law on the subject."

In the case of *Stull v. DeMattos (supra)*, 23 Wash. 71, 76, the same court upheld an ordinance licensing auctioneers, and said:

"Can the ordinance be upheld as an exercise of the taxing power? As has been shown, the statute expressly empowers municipalities of the class to which the city of New Whatcom belongs to license for the purpose of revenue as well as of regulation all and every kind of business, without limitation as to the amount of tax that may be thus imposed. For this reason it cannot be said that the ordinance in question is in excess of the power conferred upon the municipality by its charter."

In the case of *McKnight v. Hodge*, 55 Wash. 289, 298, the Supreme court of Washington upheld an act taxing peddlers, according to the conveyance used by them, from $100.00 to $300.00 per annum. The act was sustained and in its opinion, that court said:

"There would be some ground for contending that the fee charged for the license is excessive if the law be regarded only as a police regulation; but we see no reason for imputing to the legislature an intention other than to exercise both the police and taxing power in its passage. This view of the law was entertained by Judge Hanford of the Federal court of this district, in *Ex parte Crowder*, 171 Fed. 250, where it was held the law did not violate the equal rights provisions of the state or national consitutions, either in its discrimination between the classes it recognizes, in the excessiveness of the license fee, or in the other conditions imposed.

"We are of the opinion that the law does not violate any rights guaranteed by the state or national constitutions, and that the petitioner's prayer for the writ should be denied."

In the case of *Sperry & Hutchinson Co. v. Tacoma (supra),* 68 Wash. 254, the supreme court of that state upheld an ordinance requiring each person, firm or corporation using coupons and trading stamps, to pay an annual license fee of $100.00. In so doing, the court said:

"We have not, however, found it necessary to follow the plaintiff in its discussion of the several contentions suggested, as we think they have all been foreclosed by the prior decisions of this court. In *Fleetwood v. Read,* 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205, an ordinance of the city of Tacoma, the exact counterpart of the one now in question, was upheld by us against an attack made on the ground that it was void because of the matters charged against the present ordinance; and in numerous cases decided before and since that time, we have upheld similar ordinances against similar attacks. *Walla Walla v. Ferdon,* 21 Wash. 302, 57 Pac. 796; *Stull v. DeMattos,* 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *Seattle v. Barto,* 31 Wash. 141, 71 Pac. 735; *In re Garfinkle,* 37 Wash. 650, 80 Pac. 188; *Oilure Mfg. Co. v. Pidduck-Ross Co.,* 38 Wash. 137, 80 Pac. 276; *McKnight v. Hodge,* 55 Wash. 289, 104 Pac. 504; *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 Pac. 1101.

"The case of *Fleetwood v. Read, supra,* is cited in all of the foregoing cases with two exceptions, and is in each instance mentioned with approval. It is also cited with approval in the cases of *State v. Clark,* 30 Wash. 439, 71 Pac. 20; *State v. Ide,* 35 Wash. 576, 77 Pac. 961, 102 Am. St. 914, 67 L. R. A. 280; and *Thurston County v. Tenino Stone Quarries,* 44 Wash. 351, 87 Pac. 634; although the point at issue in these cases was not the validity of a license ordinance.

"These cases are conclusive of the questions at bar if they are allowed to control, as to hold with the

appellant is to deny their authority. We believe they were rightly decided, and decline to overrule them."

Indeed, if we eliminate property of the United States, governmental agencies of the United States, exports, imports, and interstate commerce, it may be stated that everything else is subject to the sovereign power of the state to tax.

Early in its history this court stated that the power of the state to tax extended to "every object of value within the sovereignty of the state."

Society for Savings v. Cort, 6 Wall. 594.
Ward v. Maryland, 12 Wall. 428.

These cases conclusively establish the right of the legislature to require the payment of a license fee for the purpose of revenue as well as regulation. In each of these cases the court has sustained the respective acts in question as an exercise of the state's power to tax for revenue and regulation, and we submit that when it appears that the state possesses power to tax, and has exercised that power as in the case at bar, the act is one with which this court cannot interfere.

The appellees contended in the lower court, and doubtless will make the same contention in this court, that even if the act in question does not deny the equal protection of the law, it is prohibitive in fact and therefore unconstitutional. In the first place, it cannot be inferred from the amount of the license fee

that the tax is prohibitive. In the case of *Williams v. Fears*, 179 U. S. 270, this court, answering a similar contention, said:

"The general legislative purpose is plain and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject."

In the case of *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, 88, the Circuit Court of Appeals for the Fourth Circuit, in upholding against a similar contention an act of West Virginia imposing a license fee on all persons, firms and corporations engaged in the trading stamp business, of $500.00 for each county in which said business was carried on, said:

"But there is still another difficulty in the way of holding this tax invalid. Has this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is so much that it could not reasonably have been intended to produce revenue?"

After citing a number of decisions of this court, to which we shall call attention later, that court answered the question so propounded in the negative. It may be said, parenthetically, that that case is the only case we have been able to find in which the trading stamp or coupon business was ever considered by any United States Circuit Court of Appeals.

In the case of *Stull v. DeMattos,* 23 Wash. 71, 79, the Supreme Court of Washington said:

"If, however, it be conceded that the courts have power to declare a municipal ordinance levying a license tax on businesses invalid on the ground that the tax imposed is so oppressive and unreasonable as to amount to confiscation, rather than taxation, they will not determine the question by a mere inspection of the amount of the tax imposed. All presumptions and intendments are in favor of the validity of the tax. It will be presumed, in the absence of a contrary showing, that the municipal authorities acted justly and honestly, and not in disregard of the rights of the citizens or property holders of the municipality; that a necessity for the revenue to be derived from the tax exists; that an equally high rate has been levied upon all business and on all property; and, however large the particular tax complained of may appear to be, it will be presumed to be in harmony with all other taxation, and not an unjust or unreasonable discrimination. In other words, the mere amount of the tax does not prove its invalidity. To determine the amount of revenue required by the needs of the municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion. To quote Chief Justice Marshall, it is 'unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.'

"Passing, then, to the record, the only evidence we find that might be said to support the contention of the appellant that the tax imposed by this ordinance is unreasonable and oppressive, is the showing to the effect that the ordinance was passed upon the petition of certain merchants of New Whatcom; that no license had been taken out to sell merchandise in this manner since the ordinance went into effect; that the

auction conducted by the appellant, held while the temporary restraining order issued in this case was in force, would have been unprofitable had he been compelled to pay the license fee required by the ordinance; and the statement of one of the witnesses that the ordinance was intended by the city council to be prohibitory. But we think this inconclusive. Every citizen of a municipality has an undoubted right to petition for such legislation as he may think will be beneficial to the community. The fact that no license has been taken out under the ordinance might be evidence that it was less profitable to sell goods in this manner than in the ordinary way, even had auction stores been common prior to the passage of the ordinance, but it would not prove that it was wholly unprofitable. Nor does the failure of the appellant have this conclusive effect. So many conditions enter into every business enterprise, that it cannot be said that its non-success is caused by any one condition. It may be the fault of the individual having the business in charge. Common experience needs only to be cited to prove that under exactly similar conditions many succeed where one fails."

In the case of *In re Garfinkle*, 37 Wash. 650, 655, the same court said:

"Testimony was also introduced to the effect that the license or tax was prohibitive of the business sought to be controlled. Of course, it is an unquestioned principle of law that a municipality cannot, under the guise of license or regulation, place the license so high that it is prohibitive of the transaction of the business sought to be engaged in; but, while it was conclusively shown by the testimony in this case that the license was burdensome, under the conditions existing, and that peddlers could not afford to engage in the business of peddling and pay the tax required, it was also shown that there were some eighty persons engaged in this business; and, as was said in *Stull v. DeMattos, supra:*

"'So many conditions enter into every business enterprise, tending to make it successful or unsuccessful, that it cannot be said that its non-success is caused by any one condition. It may be the fault of the individual having the business in charge. Common experience needs only to be cited to prove that under exactly similar conditions many succeed where one fails.'

"In this particular case not only the business qualifications of the parties who swore to the fact that they could not make a living, if they paid this license, are to be taken into consideration, but the other fact as to the amount of competition in the business. It might be that, if there were no license imposed, the competition would be so great that one could not engage in the business with profit. A license cannot be said to be prohibtive in amount where it is shown that one hundred men could not pay the license and do the business profitably. The same might be said of fifty or twenty-five, or any number of men greater than one. But the doctrine must be restricted to an individual, or to the business under the most favorable circumstances, divested of the element of competition, inability, inexperience, and other qualities which might lead to the failure of any business, with or without the payment of a license."

In the case of *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, the plaintiff and appellant urged the unconstitutionality of an ordinance requiring the payment of a license fee of $100.00 per annum for the privilege of giving trading stamps and coupons on the alleged grounds, among others, that the act was void because prohibitive of appellant's business. The court, however, upheld the ordinance.

In the case of *Sperry & Hutchinson v. Melton*, 71 S. E. 19, the Supreme Court of Appeals of West Vir-

ginia, in considering the constitutionality of an act prescribing a license tax of $500.00 on the business of selling trading stamps and coupons to merchants, said:

"The sole basis for the argument against the legality of the tax is that the plaintiff will not be able to carry on the business of issuing and redeeming trading stamps in the single city of Charleston, if it is compelled to pay the license tax which the officers of Kanawha county are seeking to collect from it under the statute we have mentioned. If the fact appeared that the tax has been fixed at such a large sum as to be absolutely prohibitive of the trading stamp business throughout the state, the case might call for a decision other than the one we shall announce. But as to such instance we do not decide. The record of this case does not warrant the claim that the statute is one intended to prohibit the business. Plainly the statute is not in terms one of prohibitory character, and nothing makes it appear to be such in fact. How can we say that this license tax was intended to prohibit, or even control, the business in which the plaintiff is engaged? It is not disclosed that the business throughout the state is not a proper subject for the tax. It does not appear that the tax is even oppressive to such a line of business. The fact that the plaintiff cannot succeed in the business in one city of the state, if it must pay the tax for the county of that city, surely cannot axail to overthrow the legitimacy of the legislative effort to provide a revenue. Though the plaintiff may not be able to succeed in the business under the tax, for all we are told there may be many other persons engaged in it that are making enormous profits, even in the city the plaintiff mentions. Yea, for all we can see from the record, it may be that the plaintiff cannot make profits because of the greater business success that has attended these other persons in the same city. Moreover, it may be

that the plaintiff entered the local field too late, after others had established a lucrative hold under the tax, or that those others have better business intelligence and management than the plaintiff. Certain it is that the failure of the plaintiff to make profits cannot alone brand the tax as unjust and invalid. "The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be competition or negligence on his part, or other considerations affecting the extent of the business of the complainant." *Nashville, C. & St. L. R. Co. v. Attalla*, 118 Ala. 362, 24 So. 450. We cannot overthrow the tax on mere assumption. We must speak by the record."

Appellees, however, contend that the amount of the tax imposed is prohibitive, and that the act is, therefore, invalid. Even if the amount of the tax is prohibitive, that fact would be immaterial, because this court has held that if the state possesses the power to tax, the extent of exercise of the power is immaterial. In the case of *Weston v. Charleston*, 2 Peters 449, 466, this court said:

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe."

In the case of *Union Pacific R. R. Co. v. Peniston*, 18 Wallace 5, this court said:

"That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property,

trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in this acknowledging the extent of the power to tax belonging to the states, we have declared that it is indispensable to their continued existence. No one ever doubted that before the adoption of the Constitution of the United States, each of the states possessed *unlimited* power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls, or duties on internal production, manufacture or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws. As was said in *Lane County v. Oregon*, 7 Wall. 77 (74 U. S. XIX, 104):

"'In respect to property, business and persons within their respective limits, the power of taxation of the states remained, and remains entire, notwithstanding the constitution.'

"It is, indeed, a concurrent power (concurrent with that of the general government), and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the state commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the Na-

tional government. There is nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation. *To the extent just indicated, it is as complete in the states as the like power within the limits of the constitution is complete in Congress.* Such are the opinions we have expressed heretofore, and we adhere to them now."

In the case of *McCulloch v. Maryland*, 4 Wheaton, 316, 428, this court said:

"It is admitted that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

In the case of *Veazie Bank v. Tenno*, 8 Wallace 533, this court said:

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judiciary cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution."

In the case of *Kirtland v. Hotchkiss*, 10 Otto. 491, this court said:

"In *McCulloch v. Maryland*, 4 Wheat. 428, this court considered very fully the nature and extent of the original right of taxation which remained with the states after the adoption of the Federal constitution. It was there said 'That the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable *to the utmost extent to which the government may choose to carry it.*' Tracing the right of taxation to the source from which it was derived, it was further said: 'It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation.'

" 'This vital power,' said this court in *Bank v. Billings*, 4 Pet. 563, 'may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. *The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation.*'

"In *St. Louis v. Ferry Co.*, 11 Wall. 423 (78 U. S. XX, 192) and in *State Tax on Foreign Held Bonds*, 15 Wall. 300 (82 U. S. XXI, 179), the language of the court was equally emphatic." * * *

"We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which under the constitution of the United States exist between the Federal and state governments. Upon their strict observance depends, in no

small degree, the harmonious working of our complex system of government, Federal and state."

In the case of *Wiggins Ferry Co. v. St. Louis*, 107 U. S. 365, this court said:

"Counsel for plaintiff in error contend that if the power of the city of East St. Louis to exact a license fee of $100 from every ferry-boat is conceded, the city could double or treble the fee at will. It is sufficient to say in reply to this, that it does not follow from the fact that a power is liable to abuse that it does not exist. If the power is abused, the remedy is with the legislature."

In the case of *Spencer v. Merchant*, 125 U. S. 345, this court said:

"The power to tax belongs exclusively to the legislative branch of the government. *U. S. v. New Orleans*, 98 U. S. 381, 392, 25:225; *Meriwether v. Garrett*, 102 U. S. 472, 26:197. In the words of *Chief Justice Chase*, condensing what had been said long before by *Chief Justice Marshall:*

" 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' (Citing authorities.)"

In the case of *McCray v. United States*, 195 U. S. 27, 55, the present Chief Justice, in considering the same proposition, said:

"It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave function lodged

in the judiciary, to confine all the departments within the authority conferred by the constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers *with the object or motive of reaching an end not justified*, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department." (Italics ours.)

The court then reviewed all its prior decisions on the subject, in all of which this court declined to interfere with a taxing act because of the extent of the exercise of a conceded power to tax, and denied the claim that the tax in question was void because of the amount of the tax.

In the case of *Kehrer v. Stewart*, 197 U. S. 60, 69, this court said:

"What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, *the amount and necessity of the tax are not open to criticism here.*" (Italics ours.)

Despite all the foregoing authority, which is all one way, a final attempt was made in the case of *Flint v. Stone, Tracy Co.*, 220 U. S. 107, to have this court uphold the contention then made that because

of the effect of the exercise of power to tax, the power should be denied. Mr. Justice Day, speaking for the court (p. 168), said:

"It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in *McCulloch v. Maryland*, that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress."

The court reviewed the authorities above mentioned, and then said:

"The argument at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the representatives, and not in the exertion of unwarranted powers by courts of justice."

In the case of *Frederick v. Seattle*, 13 Wash. 428, 436, the Supreme Court of the State of Washington said:

"It is announced by Mr. Cooley in his work on Constitutional Limitations (5th ed., p. 593), that:

" 'The power to impose taxes is one so unlimited in its force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it.'

"A general review of this chapter conclusively shows that the overwhelming weight of authority, in fact, all authority, goes to the extent of according this

power to the legislature, and the courts will not inquire into the policy of the tax, or undertake to limit the authority of the legislature, so long as it is exercised within the constitutional limitations and so long as it appears that it is a proper exercise of a taxing power."

Of the foregoing cases just cited, the following involved the validity of a city ordinance:

Wiggins Ferry Co. v. St. Louis;
Frederick v. Seattle.

The following involved a state statute:

Spencer v. Merchant;
Kirkland v. Hotchkiss;
Kehrer v. Stewart.

The following involved an act of Congress:

Veazie Bank v. Tenno;
McCray v. United States;
Flint v. Stone, Tracy Co.

The case of *Weston v. Charleston* involved a city ordinance passed pursuant to a state statute.

The lower court is in full accord with our position on this point. In its decision the court said:

"It is plainly manifest that no merchant could afford to pay the sum of $6,000 annually for the mere privilege of giving away trading stamps or allowing discounts on his cash sales. *But if this were the only objection to the act it may be that the courts would be powerless to enjoin its execution.* The power of taxation rests upon necessity, and is inherent in every independent state. It is as extensive as the range of subjects over which the government extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy." (Italics ours.)

It thus appears that the rule we invoke applies irrespective of the character of the act, and irrespective of the purpose of the act. The power of the state to tax must be admitted. The extent of the exercise of that power, therefore, is not a matter against which the courts may grant any relief by reason of any provisions of the Constitution of the United States, and we confidently assert that no decision of this court can be found in which, the power to tax existing, it was held that an act was unconstitutional merely because of the amount of the tax.

Appellees contend that the giving of trading stamps and coupons to their customers is merely an incident to their business, and that this incident, as they term it, cannot be taxed. In the case of *Emert v. Missouri*, 156 U. S. 296, this court upheld an act requiring the payment of a license fee by peddlers as a condition to their right to follow that business. What was actually taxed was questioned in the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, where this court said:

"It was the privilege of selling *in a particular way*, as a peddler, which was licensed in the *Emert* case." (Italics ours.)

In the case of *Flint v. Stone, Tracy Co.*, 220 U. S. 107, this court upheld an act of Congress imposing a tax on "every corporation, joint stock company, or association organized for profit, and having a capital

stock represented by shares" etc., and clearly held that the right to do business *in a certain way* was subject to taxation.

In the case of *Baltic Mining Co. v. Commonwealth of Massachusetts*, 231 U. S. 68, this court upheld an act of Massachusetts requiring all foreign corporations doing business in that state, at the time of filing their annual certificates of condition, to pay to the treasurer for the use of the commonwealth an excise tax of one-fiftieth of one per cent of the par value of their authorized capital stock as stated in such annual certificate of condition, but limiting the maximum tax to $2,000.00 per annum. The Supreme Judicial Court of Massachusetts upheld the act and said that it was a tax for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of the laws of that state and the financial and other advantages of a situation therein. This court took the same view and held that the tax was levied upon the *privilege* of carrying on business within the state, and not upon property therein.

If the legislature could lawfully tax the privilege of selling goods in a certain way, as held by this court in the *Emert* case, and if Congress could lawfully tax the privilege of doing business as a corporation, joint stock company, etc., as this court held in the *Stone*,

Tracy case, and if the privilege of carrying on business as a corporation could be lawfully taxed, as held by this court in the *Baltic Mining Co.* case,—and those decisions cannot be questioned—then, we submit, that it is equally true that the legislature of the State of Washington can, so far as the Constitution of the United States is concerned, lawfully tax the right to do business in a certain way.

The State May Prohibit the Use of Trading Stamps by Virtue of the Police Power.

But irrespective of all the foregoing, and in order to meet appellees' contention squarely, let us assume for the purpose of argument that the tax imposed by the act not only is prohibitive, but that, in fact, the act actually prohibits giving of stamps and coupons, and consider then the question whether the legislature could lawfully, through the police power, prohibit the same.

The police power, as defined by many of the state courts, is the power by which the legislature may prescribe rules of protection for the public morals, public health and public safety. This court has never taken so narrow a view of that power. This court holds that a legislature has power to pass an act for

the above purposes, and in addition thereto for the *weifare* and *prosperity* of the public.

Barbier v. Connolly, 133 U. S. 27;
C., B. & Q. Rd. Co. v. Illinois, 200 U. S. 561, 592;
Bacon v. Walker, 204 U. S. 303, 317;
Halter v. Nebraska, 205 U. S. 34;
Central Lumber Co. v. South Dakota, 226 U. S. 157.

In the case of *Barbier v. Connolly (supra)*, 113 U. S. 27, this court said:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

In the case of *C., B. & Q. Rd. Co. v. Illinois (supra)*, 200 U. S. 561, 592, this court said:

"We hold that the police power of the state embraces regulations designed to promote the public convenience or the general *prosperity*, as well as regulations designed to promote the public health, the public morals, or the public safety."

The police power of the State of Washington is equally as extensive. In the case of *Karasek v. Peier*, 22 Wash. 419, 426, that court said:

"Upon the common law maxim above quoted rests, as we have seen, what is termed the police power of

the state, which, in its broadest acceptation, means the general power of the state to preserve and promote the public welfare, even at the expense of private rights."

In the case of *State v. Buchanan,* 29 Wash. 602, 610, the Supreme Court of the State of Washington said:

"Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint. This all flows from the old announcement made by Blackstone that when man enters into society, as a compensation for the protection which society gives to him, he must yield up some of his natural rights, and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights. Transportation companies are now controlled and restricted, where a few years ago they claimed the right to transact their business exactly as it suited their private interests. The practice of medicine is restricted and controlled; laws against quackery and empiricism are enforced without question. The sale of liquor, which formerly was a legitimate business, and which the citizen had a right to enter into, as he did any other business, without any restrictions, has now become subject to the control of the state, or to actual prohibition at the will of the state. The changing conditions of society have made an imperative

call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society."

In the case of *State v. Pitney*, 79 Wash. 605, the Supreme Court of the State of Washington upheld this identical act as a valid exercise of the police power.

The legislature being familiar with local conditions, is primarily the judge of the necessity for such enactments, and although courts differ from the legislature in matters of policy, and although an act works injustice, such facts constitute no ground for interference unless the act in question is so arbitrary as to be unmistakably and palpably in excess of legislative power.

Otis & Gassman v. Parker, 187 U. S. 606, 609;
Atkins v. Kansas, 191 U. S. 207, 223;
M. K. & T. Ry. Co. v. May, 194 U. S. 267, 269;
Jacobson v. Massachusetts, 197 U. S. 11;
McLean v. Arkansas, 211 U. S. 539;
Schmidinger v. Chicago, 226 U. S. 578;
Magoon v. Illinois Trust Co., 170 U. S. 283, 293;
Quong Wing v. Kirkendall, 223 U. S. 59, 62;
Metropolis Theater Co. v. Chicago, 228 U. S. 61;
Patsone v. Pennsylvania, 232 U. S. 138, 144.

In the case of *Otis & Gassman v. Parker (supra)*, 187 U. S. 606, 609, this court said:

"It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an exactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. (Citing authorities.) But general propositions do not carry us far. While the courts must exercise a judgment of their own, it is by no means true that every law is void which may seem to the judges who pass upon it *excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.* Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*" (Italics ours.)

In the case of *Atkins v. Kansas (supra)*, 191 U. S. 207, 223, this court said:

"No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of *justice or reason or wisdom*, annul statutes that had received the sanction of the people's representatives." (Italics ours.)

In the case of *Schmidinger v. Chicago (supra)*, 226 U. S. 578, this court said:

"This court has frequently affirmed that the local authorities intrusted with the regulation of such mat-

ters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred."

In the case of *Metropolis Theatre Co. v. Chicago (supra)*, 228 U. S. 61, this court said:

"To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference."

In the case of *Petsone v. Pennsylvania (supra)*, 232 U. S. 138, 144, this court upheld an act prohibiting the possession of firearms to any resident unnaturalized alien. In the course of its opinion the court said:

"The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. (Citing authorities.)

"Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts. (Citing authorities.) If we might trust popular speech in some states it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong. (Citing authorities.)"

There was presented to the legislature of the State of Washington at the time the act in question was passed, a condition of affairs involving social and

economic questions on which it had the right to exercise its judgment. Therefore, unless this court can say that the act is so arbitrary as to be palpably and unmistakably in excess of the power of the legislature, it must stand, irrespective of any hardship which it may work, and irrespective of the wisdom of the judgment of the legislature.

Appellees are, we believe, in serious error in their theory of this action. Their amended bill would indicate that they believe the police power depends upon the ability of counsel to prove a state of facts which would justify the enactment. It would be a remarkable thing for the court to say that a state of facts which would justify the legislature in passing a police act, and that, therefore, the power did not exist. The power of the legislature to pass an act is not dependent on the facts which may appear of record, nor is it necessary that the court can take judicial notice of the existence of the evil against which the act is directed. *If any facts whatever can be imagined, the existence of which would justify the act, it must be sustained.*

Munn v. Illinois, 94 U. S. 113, 132;
Antoni v. Greenhow, 17 Otto 769, 775;
Austin v. Tennessee, 179 U. S. 343, 361, 363;
Otis & Gassman v. Parker, 187 U. S. 606, 609;
Atkin v. Kansas, 191 U. S. 207, 222;
M. K. & T. Ry. Co. v. May, 194 U. S. 267, 269, 270;

Bacon v. Walker, 204 U. S. 311, 317;
Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 255, 257;
McLean v. Arkansas, 211 U. S. 539, 548, 551;
Welch v. Swazey, 214 U. S. 91, 107;
Southwestern Oil Co. v. Texas, 217 U. S. 114, 126;
Watson v. Maryland, 218 U. S. 174, 179;
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78;
Barrett v. Indiana, 229 U. S. 26.

In the case of *Munn v. Illinois (supra),* 94 U. S. 113, 132, this court said:

"For our purposes *we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.* For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. *But if it could, we must presume it did.* Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge." (Italics ours.)

In the case of *Otis & Gassman v. Parker (supra),* 187 U. S. 606, 609, this court said:

"We cannot say *that there might not be conditions of public delirium* in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion." (Italics ours.)

In the case of *Atkin v. Kansas (supra)*, 191 U. S. 207, 222, this court said:

"It may be that the state, in enacting the statute, intended to give its sanction to the view, held by many, that, all things considered, the general welfare of employes, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. *We have no occasion here to consider these questions, or to determine upon which side is the sounder reason.*" (Italics ours.)

In the case of *M. K. & T. Ry. Co. v. May (supra)*, 194 U. S. 267, 269, 270, this court said:

"Approaching the question in this way we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. *But it may have been found, for all that we know*, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. *It may be* that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. *Other reasons may be imagined.* Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (Italics ours.)

In the case of *McLean v. Arkansas (supra)*, 211 U. S. 539, 548, 551, this court said:

"*If there existed a condition of affairs* concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, *it must be sustained;* if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of the legislative power, the act must fail." (Italics ours.)

In the case of *Southwestern Oil Co. v. Texas (supra)*, 217 U. S. 114, 126, this court said:

"What were the special reasons or motives inducing the state to adopt the classification of which the oil company complains, *we do not certainly know, nor is it important that we should certainly know.*" (Italics ours.)

It being conclusively settled that an act of the legislature in the exercise of its police power must be sustained if the court can conceive of any state of facts which would justify it, irrespective of what may appear in the record, let us see if facts might exist which would justify the act in question as a police measure. The court will observe, by reference to paragraph four of the amended bill (Record p. 31), and paragraph eight of the amended bill (Record p. 33), that these stamps or coupons are given with each purchase and in a denomination equivalent to the amount of the purchase. Suppose the legislature ascertained that these stamps cost the merchant $3.50

per $100.00 worth, that is, 3½ per cent of his gross sales. It follows, of course, that this additional charge becomes a part of the fixed expense of doing business, and is ultimately paid by the consumer. He then pays not only for what he actually wants and actually purchases, but for something else in addition, to the inevitable tendency to increase the cost of the necessaries of life. It is of no consequence that a consumer may not want the stamps, and the so-called premiums which consist of "lamps, desks, chairs, tableware, bookcases, toilet articles, smokers' articles, cutlery, stationery, leather goods, pictures, jewelry, musical instruments, and various other articles of household, personal and general use" (Record p. 32); it is no consequent that these articles may be wholly different from any such articles which the purchaser already has or may desire, or that they are of such inferior quality as to be undesirable for any purpose; in any case, he nevertheless pays for them every time he purchases an article from the merchant who uses these stamps to the extent at least of 3½ per cent of his gross purchase. Suppose the legislature was of the opinion that the use of these stamps unduly encouraged the "get something for nothing" idea so prevalent among the poorer class of people; suppose—bearing in mind that the companies will not redeem a single stamp but that for redemption a number must be accumulated—the legis-

lature was of the opinion that money was being continuously spent for the purpose of acquiring these stamps, which but for them would not have been so spent, and which expenditures were in a large measure unnecessary and could not be afforded; suppose the legislature was of opinion that these stamps encouraged indiscriminate and useless expenditures among people illy able to support themselves and their children, among the classes in which the sons of tender years leave off school and join the procession to the factory in the ceaseless grind for the means of existence, among the families in which dire necessity drives the young daughters into the factory or store from early morning until late at night, or in short among people too likely to become public charges and from which class our public unfortunates too frequently come. Suppose the legislature was of the opinion that the use of these stamps encouraged extravagance in an age in which that vice is rampant, and that it should remove one of the causes inciting it. Suppose the legislature believed that these stamps encouraged boys to indulge in excessive purchases of tobacco products with their resultant excessive use of them. Suppose the legislature believed and learned the actual fact that in order to get the use of stamps started in any territory the parties engaged in the stamp business were accustomed to make a contract with one

merchant—the most prominent merchant they could secure—to use these stamps and as an inducement would in addition pay him a percentage of all sums collected by them from the sale of stamps to other merchants, and then use the contract so secured to force other merchants to buy the stamps at the rate of $3.50 per $100.00 worth by means of threats of loss of trade, and that it was necessary for the parties engaged in the trading stamp business after having been guilty of such tactics to insert in the contract with each of the other merchants a provision such as appears in the contract set forth in the case of *Denver v. Frueauff*, 39 Colo. 20, which is as follows:

"Said party of the second part also agrees to display signs furnished by said company, which read, 'We Give S. & H. Green Trading Stamps,' or otherwise, in the windows and other prominent places about its stores, and agrees not to procure said stamps in any way except direct from said company, either during the term of this contract or at any time; and also agrees to mention favorably the use of said stamps in all newspaper and other advertisements published by or for it; and not to use any other coupons, trading stamps, or similar device during the term of this contract, *and not to join in any combination of merchants for the purpose of discontinuing the use of said company's trading stamps.*" (Italics ours.)

Without an explanation, it would seem very strange that the trading stamp companies should find it necessary to insert such a provision in their contract with their respective subscribers, in view of the

claim made in this bill that the use of trading stamps is one of such great advantage to merchants; but in view of the above explanation, which is the fact, its necessity is quite apparent. Further, suppose, in these days of everincreasing cost of the necessaries of life to a point beyond even the celebrated "war prices," by reason of the everincreasing interference of the middleman, the legislature concluded that the stamp business is of no use, except for the enrichment of a few men, at the expense of legitimate business and the ultimate consumer, and that the stamp business is detrimental to the public welfare and general prosperity. The court will bear in mind that the Congress of the United States has viewed with alarm the everincreasing cost of the necessaries of life, and that committees have been frequently appointed by that body to investigate the subject and that many comprehensive reports have been made thereon. The court will bear in mind that a business is not being prohibited within the issues involved in this case. All that the legislature has done so far as these appellees are concerned, is to prohibit a mere incident to the business conducted by them, to cut off a practice which some of them have adopted, which serves no useful purpose whatever, but which acts merely as a leech on business, preying on the merchants and the consumer alike without any valuable return to either of them.

The court will bear in mnid that it is not necessary for it to determine whether any of the above are the facts—although in truth they are. It is necessary only for the court to say whether they do or do not furnish justification for the act, and conceding the above to be the facts, or conceding anything else which may occur to this court to be the fact, can this court say that the legislature exceeded its power, that the act has no relation to the purposed end, and that it is "palpably arbitrary and unmistakably in excess of legislative power?"

Again, let the court bear in mind that the legislatures of a large number of the states from the year 1888 to the present date, as we shall show hereinafter, have viewed the trading stamp business as sufficiently detrimental to the public welfare and the general prosperity to have induced them to pass acts prohibiting the business or imposing a very substantial license fee on it. It will not do, therefore, to say that the above act is one of those acts resulting from unconsidered impulse. The act is an expression of the legislature of the State of Washington entirely consonant with the views of the legislatures of a majority of the other states. Certainly such a general view of this subject cannot be without a very substantial foundation.

It is sometimes stated by extreme trading stamp and coupon advocates that the business is a useful

one. This view can hardly be sustained. No less an eminent authority than Professor Freund, in his valuable work on Police Power, has this to say (section 293):

"At the same time it must be admitted that the trading stamp business serves no useful purpose, and the essential constitutional question is whether a useless business may be prohibited."

In the case of *Murphy v. California*, 225 U. S. 623, this court upheld an ordinance prohibiting the keeping of billiard and pool tables for hire or public use. In the course of its opinion the court said, (p. 628):

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many *nonuseful* occupations which may or may not be harmful to the public, *according to local conditions*, or the manner in which they are conducted." (Italics ours.)

It will not do to say that these evils may not exist in *large degree*. In the case of *State ex rel. Sitz v. Hesterberg*, 211 U. S. 31, 39, this court held a game law a proper police measure, and justified it on the ground that the absence of game laws would tend to decrease food supplies, when in fact a very small portion of food supply is game.

In the case of *Petit v. Minnesota,* 177 U. S. 169, this court upheld an act prohibiting barbering on Sunday, and justified it on the ground that otherwise barbers might be deprived of their rest on half of such days, when in truth and in fact but a very small proportion of the population are barbers.

In the case of *Murphy v. California,* 225 U. S. 623, this court upheld an ordinance prohibiting any person from keeping or maintaining any hall in which billiard or pool tables were kept for hire or public use, with certain immaterial exceptions, on the ground that the existence of such places *tended* to idleness, when as a matter of fact the courts could probably take judicial notice of the fact that a very small percentage of the population of the country are interested in the game of pool or billiards or resort to places where such games are played. As a matter of fact the *degree* of the evil justifying legislative interference is a question primarily for legislative judgment, and is a matter with which the courts have no concern. It would be a remarkable thing if the courts should say that the legislature could not prohibit a practice until after it had affected the public *generally,* or that until an evil had attained a certain stage and until it had become prevalent to a degree *fixed by the court,* the legislature could not direct its acts against the evil. But be that as it may, it is suf-

ficient for the present to say that if the police power of the legislature does in fact depend upon the degree of the evil in question, there is nothing shown in this record except the conclusion of the pleader that the evil sought to be reached by the legislature had not attained very substantial proportions. It will not be disputed, we apprehend, that this court has no such knowledge of local conditions in the State of Washington as would enable it to say that the evil against which this legislation is directed had not reached a degree sufficient to warrant the act, any more than it was able to say from its knowledge of local conditions in the state of Pennsylvania, as in the *Patsone* case, that the evil there sought to be prohibited had or had not attained such degree according to local conditions as would justify the act.

It will not do to say that it is no part of the legislative function to protect the foolish from their own acts. It may, and doubtless is, true that many people are careless of their own welfare to a degree approaching criminality. Even if such persons have no interest in their own welfare, the state has an interest therein, because the prosperity and welfare of the state depends almost wholly on the prosperity and welfare of its inhabitants. It certainly is within the power of the legislature to prohibit those acts which encourage excessive expenditures to no useful purpose, and which tend to prevent the necessity of

maintaining public charges. Lotteries were prohibited, not only because they were a form of gambling, but because they tended to the impoverishment of the public. This clearly appears from the opinion of Mr. Justice Grier in *Phelan v. Virginia,* 8 How. 163, where he uses the following language:

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilance of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

In the case of *Otis & Gassman v. Parker,* 187 U. S. 606, this court upheld an act prohibiting the purchase of mining stock on margin, and at page 609 said:

"We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stock on margins he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him pen-

niless, with nothing to represent his outlay, except that he has had the chances of a bet."

In the case of *Murphy v. California,* 225 U. S. 623, this court upheld an ordinance prohibiting the keeping of billiard and pool tables for hire, on the ground that the maintenance of such resorts tended to idleness and to playing beyond the proper limits of recreation.

Fortune-telling has been prohibited because of the frauds practiced on the ignorant and unwary. *State v. Neitzel,* 69 Wash. 567. Laws providing for the creation of spendthrift trusts have been upheld, and certainly no one would contend that they were not for the benefit of the unwise.

The doctrine formerly advocated by many of the state courts, that this government was not one of paternalism, has long since been shown to be fallacious. The courts pronouncing that doctrine took too limited a view of the matter, their view having in it no place for the state at large. They saw merely protection to a few individuals, ignorant maybe, foolish probably, and improvident certainly. That view eliminates the most important element in a very large portion of legisation commonly termed police power acts. The state at large is entitled to the same protection that a few individuals in it receive. It is only too evident that if these evils, having a direct effect on a portion of the population, be not checked, the state

at large is compelled by taxation of all its inhabitants and their property to maintain this class. This, of course, is a primary and probably a most materialistic view, but withal wholly practical. In addition thereto is the higher conception of the public welfare in a broad sense of the term, that condition of affairs which increases intelligence, tends to greater wisdom, to higher intellectual development, and to all that degree of culture which is found in every permanent government.

Why, we inquire, should it be conceded on the one hand that the police power extends to all the great public needs, to all acts necessary for the general welfare and prosperity, and at the same time say that an act which will eliminate from business these men who have edged themselves between the producer and the consumer, and who are levying their 3½ per cent profit of gross sales to the ultimate cost to the consumer, are beyond the right of legislative interference, when on the plainest principles of sound sense they admittedly serve no purpose except their personal enrichment. It will be argued, of course, that the use of these stamps and coupons does not enhance the price of merchandise to the consumer. It may be true that no one could say that he paid more for a pound of sugar, for instance, when he purchased it from a merchant using coupons, than when the same commodity was purchased from a merchant

who did not use them. Any one, however, who argues that the additional cost of these so-called premiums, or the cost of this coupon and trading stamp business, is not ultimately paid by the consumer in one form or another, is attempting to establish a statement proven false by the history of all ages. It may be that present day prices, which are beyond the level of even the celebrated "war prices," are not due to the trading stamp or coupon business. It would be useless, however, to argue that all these forms of activity, all these parasitical growths on business which have intervened between the manufacturer and the consumer, are not ultimately paid by the consumer, and that their necessary effect is not to increase prices to the benefit of no one except the man who is furnishing the coupons or trading stamps and getting his 3½ per cent of gross sales therefor. This is not an act regulating prices. It is, however an act, viewed in the sense we are now considering it, which will eliminate from legitimate business certain practices which have grown up and which, as shown by the books, business men have for years been attempting to eliminate. We have, therefore, to say the least, a form of private graft which serves no useful purpose whatever, a form of business—if you desire so to honor it—which consists wholly and solely in levying tribute upon legitimate business to the annoyance of the merchant and the additional cost to the gen-

eral public, with all its other attendant evils. And we submit that a concession that the police power extends to all the great public needs and justifies acts tending to the general welfare and public prosperity, forecloses any possibility of escape from the conclusion that the facts above mentioned justify the abolition of the trading stamp and coupon business in its entirety.

Let us call attention to just a few cases decided in recent years by this court. In *Missouri Pacific Ry. Co. v. Mackay,* 127 U. S. 205, the court sustained the Kansas act of 1874 abolishing the fellow servant doctrine in the case of railroad companies.

In *Chicago, Rock Island & Pacific Ry. Co. v. Zernecke,* 183 U. S. 582, the court sustained the Nebraska act making railroad companies *insurers* of the safety of their passengers *regardless of fault.*

In the case of *"The Osceola,"* 189 U. S. 158, the court held that in admiralty vessels and their owners are liable, in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

In *C., B. & Q. Rd. Co. v. McGuire,* 219 U. S. 549, this court upheld a ~~contract~~ statute defining the liability of railway corporations for injuries resulting from negligence and mismanagement in the use and operation

of their railways, and providing that when such companies were sued on such liability they could not defend on the ground that the plaintiff was barred from recovery by the acceptance of benefits under a contract in its relief department.

In *Holden v. Hardy*, 169 U. S. 366, this court upheld and act limiting employment in underground mines and workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency.

In *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, the court upheld an act requiring redemption in cash of store orders or other evidences of indebtedness issued in payment of wages.

In *Booth v. Illinois*, 184 U. S. 425, the court upheld an act prohibiting contracts for options to sell or buy grain or other commodities at a future time.

In *Muller v. Oregon*, 208 U. S. 412, the court upheld an act prohibiting the employment of women in laundries more than ten hours a day.

In *McLean v. Arkansas*, 211 U. S. 539, the court upheld an act making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

In the case of *Nobel State Bank v. Haskell*, 219 U. S. 104, this court upheld the Oklahoma Guarantee Bank Deposit Act.

In the case of *Central Lumber Co. v. South Dakota*, 226 U. S. 157, the court upheld an act prohibiting the selling of goods at a lower rate in one place than in another for the purpose of destroying competition of any regularly established dealer in such commodity, or to prevent the competition of any person who in good faith intended and attempted to become such dealer.

In the case of *Schmidinger v. Chicago*, 226 U. S. 578, the court upheld an ordinance of the city of Chicago establishing the weights at which bread might be sold in that city.

In the case of *Petsone v. Pennsylvania*, 232 U. S. 138, the court upheld a statute prohibiting the possession of firearms by unnaturalized aliens.

In *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, the court upheld an act empowering the superintendent of insurance of the state of Kansas *to fix rates* at which insurance might be sold in that state.

In *Erie R. R. Co. v. Williams*, 233 U. S. 685, the court upheld an act requiring the semi-monthly payment of the wages of railway employes.

In the case of *Sturgis & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320, the court upheld an act prohibiting the employment of children under the age the age of sixteen years in various hazardous employments, although the statute gave a right of action on behalf of an illegally employed minor if injured in such employment, even though the employer acted in good faith relying upon the representation of the minor that he was over sixteen.

In the case of *State ex rel. Davis-Smith v. Clausen*, the Supreme Court of Washington held constitutional the Workmen's Compensation Act, which, briefly speaking, designated as extra-hazardous a very large portion of the principal industries of the state, all persons, firms or corporations engaged in the same business being placed in the same class, and each class being compelled to pay assessments levied by the State Industrial Insurance Commission, created by the act, sufficient to pay for all injuries or deaths at a scale fixed by the act, resulting from employment in such industry. It is true that act has not been considered by this court, but it will be a matter of regret if this court, when it has considered the matter, shall find it necessary to hold the act void.

In this connection our attention has been called to a most interesting article appearing on page 296 of Volume 13 of the Columbia Law Review (April,

1913), written by Mr. Charles Warren, of the Boston Bar, in which he states that the cases decided by this court contained in volumes 123 to 222, inclusive, of the reports of this court, show only three cases in which what he calls "social justice" acts, but which we understand to be pure police power acts were held violative of the Federal constitution. *Allgeyer v. Louisiana,* 165 U. S. 578, in which a Louisiana law depriving citizens of the right to order insurance by mail from foreign insurance companies was held invalid as an interference with liberty of contract; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, in which the court held invalid an Illinois anti-trust law because it illegally discriminated in favor of certain classes; and *Lochner v. New York,* 198 U. S. 45, in which the court held unconstitutional the bakers' ten hour law of New York. A patient search of the decisions rendered by this court from Volume 222 to date, has revealed only one other case in which this court held such legislation unconstitutional, viz., *Smith v. Texas,* 233 U. S. 630, the Texas passenger conductor law. During the period covered by the decisions of this court from Volume 123 to date, it is unquestionably true that more extreme legislation enacted by Congress and the legislatures of the various states has been considered by this court than in all the prior history of the country. In view of the foregoing facts, it is difficult to believe that the act

in question is violative of the constitutional provisions invoked. It is difficult to believe that the decisions of this court are not ample to uphold this act.

The reason for the failure of this court to hold the various acts above mentioned unconstitutional, is not difficult to ascertain. On questions of constitutional law the court is called on to render not a scholastic decision on the question presented, but must at the same time consider what judgment is permissible to another department of the government which the constitution has charged with the duty of making it. These acts also involve local conditions with which this court at best is only imperfectly, and in the majority of cases wholly, unfamiliar, and it is the province of the local legislatures to deal with local conditions as they deem wise. That has caused this court to hesitate to declare the judgment so pronounced violative of the provisions of the Federal constitution.

This court, in upholding exercises of the police power by various states, has frequently called attention to the state of public opinion, or to the common belief, more properly speaking, as showing the necessity of the act in question. It may be stated, with little fear of contradiction, that when an act of such character is called in question, if it appears in conformity to usage, custom, or prevailing, preponder-

ant opinion, such fact justifies the act. In other words, as time advances, and as evils appear, preponderant opinion in regard to the necessity of their regulation or absolute suppression is sufficient to justify the legislature, under its police power, so to do.

In the case of *Plessy v. Ferguson*, 163 U. S. 537, 550, involving the constitutionality of a statute requiring separate railway carriages for members of the white and black races, in passing on the power of the legislature to enact the law, this court said:

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 160, this court said:

"The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject, and with the necessities and the occasion for the irrigation of the lands than can anyone who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of facts which surround the subject in

their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question."

In the case of *Otis & Gassam v. Parker*, 187 U. S. 606, 609, this court said:

"Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect."

In the case of *Atkin v. Kansas*, 191 U. S. 207, 222, this court said:

"It may be that the state, in enacting the statute, intended to give its sanction to the view, *held by many*, that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight consecutive hours was taken to be a full day's work.

In the case of *Jacobsen v. Massachusetts*, 199 U. S. 11, 34, this court quoted with approval the following:

"The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. *The common belief, how-*

ever, is that it had a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is generally accepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. * * * A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. * * * The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, *according to the common belief of the people,* are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, *for what the people believe is for common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not.* Any other basis would conflict with the spirit of the constitution, and would sanction measures opposed to a republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." 179 N. Y. 235, 72 N. E. 97.

In the case of *Halter v. Nebraska*, 205 U. S. 34, 39, this court said:

"The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the Union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. The fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the constitution of the United States."

In the case of *Muller v. Oregon*, 208 U. S. 412, 420, this court said:

"Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and this gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration."

In the case of *Noble State Bank v. Haskell*, 219 U. S. 104, this court said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. *It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.*" (Italics ours.)

In the case of *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192, 204, this court said:

"That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the courts in its construction." (Citing authorities.) "We cannot say that there is no basis for this widespread conviction."

In the case of *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 160, this court said:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. * * * That the law embodies widespread conviction appears from the decisions in other states."

In the case of *German Alliance Insurance Co. v. Lewis,* 233 U. S. 389, this court said:

"Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. *A conception so general cannot be without cause.* The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis." (Italics ours.)

The case of *State v. Nichol,* 28 Wash. 628, 630, arose over the enactment of a Sunday law in the state of Washington. Upon the question under consideration, the court quoted from the opinion of Mr. Justice Field, as follows:

"Mr. Justice Field, in *Ex parte Newman,* 9 Cal. 502, referring to the same subject, said:

" 'Its requirement is a cessation of labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor."

The case of *McKnight v. Hodge,* 55 Wash. 289, 294, involving the validity of the peddler license law of the state. On the question under consideration the supreme court of the state said:

"Reasons quite satisfactory to some minds could be advanced for exempting peddlers of farm products from a license law, and the same can be said of vendors of books, periodicals, and newspapers; while on the other hand, there may be room for argument to the contrary. We refer to reasons and arguments relating to some legitimate purpose of the law. *The very fact that there is room for honest difference of opinion in this respect shows that it is a question of policy, and not of power in the legislature to pass the law."*

These decisions, from which the foregoing quotations are taken, do not embody any revolutionary principle. When the decision of this court in the

case of *Nobel State Bank v. Haskell (supra)* was rendered, many members of the bar professed to see in the portion of the opinion just quoted something quite revolutionary. A moment's consideration shows that nothing new or startling was announced by the court. For illustration, let us suggest the theory, accepted as fact, of the existence of the atom and molecule in matter. Such existence cannot be mathematically demonstrated; no one could say beyond peradventure that they actually do exist, yet the public at large, and even the courts, accept their existence as fact, for the very simple reason that scientists and men most learned in that particular branch accept their existence as fact. And so it is in the matter of plain, every day life. When the validity of a certain regulation or prohibition is involved in a question before the courts, what good reason could be assigned for the refusal of the courts to take notice of prevailing, preponderant opinion as to the necessity of such act, particularly when that opinion has been shown to have prevailed uninterruptedly over a long course of years. If the question of the necessity of such act were one which had to be *proven* in the *trial* of the cause, it would, of course, be proven by witnesses, and in such event no one could successfully contend that the court could give no effect to the testimony on such point. Why, therefore, the court should not avail itself of the general prevailing

belief on a certain point when that point is material, does not appear. Applying this principle to the case at bar, if it appears that the public at large, or that the legislatures of the various states have, as shown by their acts, uninterruptedly for a period of from twenty to twenty-five years, deemed the coupon and trading stamp business inimical to the public welfare, and the suppression of that business necessary to the general welfare and prosperity, that fact should foreclose any question of the absolute necessity of the act in question, even though we eliminate from consideration the presumption of its necessity which attends its passage by the legislature. With that end in view, let us very briefly call the attention of this court to all the decided cases disclosed by a patient search involving the trading stamp and coupon business in the order in which they were decided, and particularly to just what was decided in each of the cases.

In order to call the court's attention particularly to the fact, we desire to state at this point that in the vast majority of the cases in which it has been held that the trading stamp and coupon business could not be prohibited, the courts have limited the police power to the protection of the public health, morals and safety, a view considerably more limited than that which has been held by this court even from the time of the case of *Barbier v. Connolly* (*supra*), 113 U. S. 27.

The original trading stamp case, and the case on which almost all subsequent decisions have been based, is *People v. Gillson,* 109 N. Y. 389 (decided June 5, 1888). In view of the fact that that case is the parent case and the decision so largely responsible for all succeeding decisions to the same effect, the court will pardon us, we trust, if we consider it at length. The case involved the constitutionality of an act of the state of New York making it a misdemeanor for any person selling food to give away therewith as a part of the transaction of sale any other thing as a premium, gift, etc. From the opinion it appears that in October, 1887, the prosecuting witness purchased two pounds of coffee from the Great Atlantic & Pacific Tea Co., in the city of Albany, upon a representation that he would receive therewith a cup and saucer. The defendant attacked the statute on the ground that it deprived him of life, liberty or property without due process of law. The court cited as limiting the extent of the police power of the state of New York, two cases: the first, *In re Jacobs,* 98 N. Y. 98, in which that court held unconstitutional the following act:

"Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement-house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking or doing any household work therein.

"Section 2. Any house, building or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement-house within the meaning of this act.

"Section 3. The first floor of said tenement house on which there is a store for the sale of cigars and tobacco shall be exempt from the prohibition provided in section one of this act.

"Section 5. Every person who shall be found guilty of a violation of this act, or of having caused another to commit such violation, shall be deemed guilty of a misdemeanor, and shall be punished for every offense by a fine of not less than ten dollars and not more than one hundred dollars or by imprisonment for not less than ten days and not more than six months, or both such fine and imprisonment.

"Section 6. This act shall apply only to cities having over five hundred thousand inhabitants."

It might be that that act offended against a provision of the constitution of the state of New York, because later the court in its opinion called attention to the fact that it would include only the cities of New York and Brooklyn, but the decision of the court was not placed on that ground, but on the ground that such an act could not be sustained as a valid exercise of the police power in the state of New York. When we recall that this court in the case of *Austin v. Tenn.*, 179 U. S. 343, held that the manufacture of cigarettes could be prohibited under the police power, and when we further recall the noisome odor coming from a cigar and cigarette factory, we cannot believe that the police power as limited in New York is a fair

measure of that power, particularly in view of the decision of this court. The *Gillson* case being founded on the Jacobs case, naturally loses any persuasive force which it might have.

The second case cited in the *Gillson* case was *People v. Marx,* 99 N. Y. 377, in which that court held that the manufacture and sale of oleomargarine could not be prohibited. This court held otherwise in the case of *Powell v. Pennsylvania,* 127 U. S. 578, and in *McCray v. United States,* 195 U. S. 27. The opinion in the *Gillson* case shows that the court had before it the decision of this court in the case of *Powell v. Pennsylvania* at the time the decision was rendered. The fact that the court has twice held that the manufacture and sale of oleomargarine *could* be prohibited proves that the *Gillson* case is not a proper measure of the police power. Again, the learned judge in his opinion in the *Gillson* case says he lays no stress whatever upon the argument that the transaction in question in that case naturally induced people to purchase more than they want of an article of food in order to get the other article with it which comes to them in the shape of a gift, and that the poorer people are led to extravagance and outlay. He further says:

"It seems to me that to uphold the act in question upon the assumption that it tends to prevent people

from buying more food than they want, and hence tends to prevent wastefulness or lack of proper thrift among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards, and to favor that class of paternal legislation which, when carried to this extent, interferred with the proper liberty of the citizen, and violates the constitutional provision referred to."

The learned judge in the language just used, was not considering the question of power, the only question before the court, but was entering into the realms of policy, a matter with which no court in such cases has any concern whatsoever. As this court has so often said, it has no concern whatever with the wisdom, or the lack of it, of any such legislation, it has no concern with the policy of such legislation, and that the question before this court in such cases is limited to one of legislative power. So far as concerns the court's reference to paternal legislation, we believe that the view held by the court is too narrow. This court has not hesitated to uphold legislation which, within the view held by the court in the *Gillson* case might be termed paternal legislation. The court in the *Gillson* case overlooked the right of the state, seeing only the effect upon the specific individual. This court, in speaking of the protection against self which the legislature might enforce on a citizen, and in answer to an argument very similar to that of the court in the *Gillson* case, said:

"The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer." *Holden v. Hardy,* 169 U. S. 366, 397.

Again, let us call the court's attention to the fact that the *Gillson* case is the first trading stamp or coupon case. In view of the abundance of litigation which such legislation has engendered since that time, it may be safely assumed that the trading stamp and coupon business, or the principle out of which it grew, was then in its infancy. It may be that such practice was not sufficiently general in the state of New York to justify the legislation, although we respectfully suggest that that question was primarily and necessarily one for the determination of the legislature, and one with which the court had no concern, unless the act was utterly unreasonable, arbitrary, and palpably in excess of legislative power. Therefore, even though the Court of Appeals of New York may have been of the opinion that the evil against which that act was directed was not sufficient to justify the act, it must be remembered that even degrees of evil may determine the right of the legislature to exercise its police power.

Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251;

German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 418;
International Harvester Co. v. Missouri, 234 U. S. 199, 213.

From whatever angle we view the *Gillson* case, we confidently assert that it cannot be cited as decisive of the right, as now recognized, of the legislature to exercise its police power to suppress an evil which the legislatures of the states generally have attempted to suppress almost continuously from that time to the present date.

In the case of *Commonwealth v. Moorhead* (1890), 7 Pa. Co. Ct. 513, the court held that the giving to a purchaser, without additional price, a ticket entitling him to a certain sum of money, or to goods of a certain value, was not, in the absence of any element of chance or hazard, an invasion of the law against gambling and lotteries.

Next followed the case of *Long v. Maryland* (1891), 74 Md. 565, in which the court held that a gift enterprise which did not involve the element of chance could not be prohibited by the legislature even though it were carried on by a merchant to induce customers to buy his merchandise. The state prohibited barter, sale, or trade of goods, wares or merchandise, and a holding out as inducement for any such barter, sale or trade any scheme or device by way of gift enter-

prise of any kind or character whatsoever. In the course of its opinion, the court said concerning the act:

"Such regulation of trade is, in our opinion, not only *unwise* and unlawful, and unlawful because it is *necessary* neither for the benefit, safety nor *welfare* of the people, and which in its operation would be oppressive and burdensome." (Italics ours.)

The case principally relied upon was the *Gillson* case.

Again, we may suggest that with the wisdom of such legislation the court had no concern. With the necessity of the legislation, we submit that the court was equally unconcerned. In short, we believe it is not stating it too broadly to say that the case was decided on the ground of wisdom and necessity, when as a matter of fact the question of power only was before the court.

In *Commonwealth v. Emerson* (1896), 165 Mass. 146, Mr. Justice Holmes, then a member of the Supreme Judicial Court of Massachusetts, held that an act of the legislature of that state making it a penal offense to sell property on the representation that anything other than what was specifically stated to be the subject of sale, was to be delivered, did not prohibit the sale of tobacco under a promise to give a photograph to each purchaser of a package, though a purchaser were allowed to select the photograph from among a number. The court held that the words

of prohibition in the statute would have to be given a reasonable meaning; that they were not intended, and did not purport, to forbid a sale of two things at once, even though only one of them were the principal object of desire and the other an additional inducement which might turn the scale, that the aim of the statute was to prevent frauds of bargains which might appeal to the gambling instinct and to induce people to buy what they did not want by the promise of a gift or prize, the nature of which was not known at the moment of making the purchase. This case, it seems to us, instead of being an authority against the appellants, is, in fact, in their favor.

Next came the case of *Lansburg v. District of Columbia* (1897), 11 App. D. C. 512. In view of the fact that that case is the first reported decision upholding the legislation in question, we trust the court will pardon us if we deal with it fully. It involved the validity of a gift enterprise statute passed by the legislative assembly of the District of Columbia in 1871, as modified by sections 1176-1177 of the Revised Statutes of the United States. The acts are as follows:

"The proprietors of gift enterprises shall pay $1,000 annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of

amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution, of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: Provided, That no such proprietor in consequence of being thus taxed, shall be exempt from paying any other taxes imposed by law, and the license herein *required shall be in addition thereto." Laws of the District of Columbia 1871-72, Part 2, pages 96, 97.

"Section 1176. So much of the act of the legislative assembly of the District of Columbia, entitled, 'An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia,' approved August twenty-third, eighteen hundred and seventy-one, as authorizes gift enterprises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be lawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.

"Section 1177. Every person who shall in any manner engage in any gift-enterprise business in the District shall, on conviction thereof in the police court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars, or be imprisoned in the district jail not less than one nor more than six months, or both, in the discretion of the court."

The defendant, Lansburgh, was a merchant engaged in business in the city of Washington. The defendant Sperry was the managing officer of a trading stamp company called the Washington Trading Stamp Company. The company had induced Lansburgh to use its trading stamps. After reviewing

the decisions above mentioned, the court held that the sale and use of trading stamps could be prohibited, and said:

"Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently entirely novel, it could hardly have come more clearly within the scope of the statute had it been well known and expressly in the contemplation of Congress at the time of the enactment.

"The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device.

"With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between the seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant who pays them in cash at the rate of $5 per thousand. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of another, and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of the stamps, and other merchants and dealers who can not enter must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency.

"The stamps are sold at the rate of fifty cents per hundred to the contracting merchants, and yet purport to be redeemable with premium gifts of the as-

sumed value of one dollar per hundred. Unless, therefore, the so-called premiums to be distributed among the diligent collectors of stamps are grossly overvalued, the scheme can not maintain itself, for in addition to the actual cost of the premiums it has to bear the cost of the books and stamps and the maintenance of its office and exhibition room.

"If its premiums should have any fair value, then the stamp company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets — representing cash purchases of $99.00 — shall be pasted in a book and produced at one time to entitle the holder to his premium. In this event, the company, if it actually contemplates making good its contracts, is relying upon a lottery; that is to say, the chances and advantages of its game for its expectations of profit or gain.

"There is not a shadow of rational foundation for the stamp company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued and its contracts faithfully performed, its inevitable result would be, as in all necessary interventions of third persons, or 'middle men,' between producer and consumer, an increase of cost to the latter."

+In the case of *Territory v. Gunst* (1897), 18 How. 196, the court held a trading stamp statute was unconstitutional and void insofar as it prohibited a person from selling property on the representation and inducement that the purchaser should have the right to select and receive some other property as a gift or premium, which was unselected and unidentified at or before the sale, even though trading stamps were used for that purpose.

+ This paragraph should follow, not precede, the next one.

In view of the fact that that case has been followed by the court in the district to the present date, and the further fact that it has been followed by other courts, we respectfully commend that decision to the attention of this court.

Next came the *International Trading Stamp Co. v. Memphis* (1898), 101 Tenn. 181, which involved the validity of an ordinance imposing a tax on a trading stamp company, and also on each merchant using the stamps. The court held that the ordinance in question was not within the terms of the statute relating to the powers of cities to levy privilege taxes, holding that the power to levy such taxes conferred only the power to tax such privileges as had been previously taxed by the legislature, or which the legislature might subsequently authorize the city to tax. The case, therefore, was decided on the question of the power of the city as conferred by the enabling act., viz., the statute. Strange as it would now seem, the court in that case actually held that the city could be restrained from passing an ordinance even though it were void.

In *Humes v. City of Little Rock* (1898), 138 Fed. 929, decided by the Circuit Court for the Western District of Arkansas, the court held that a statute of Arkansas, authorizing cities to tax, license and suppress certain occupations named, among them gift

enterprise, did not confer power on the city to impose a license tax upon the occupation of selling trading stamps to merchants. After so deciding, the court proceeded further apparently on the theory that the act was prohibitive, and held that the business of selling trading stamps to merchants could not be prohibited, because the court conceived the business to be lawful, citing as authority the *Gillson* case. In the course of its opinion, the court said:

"It may be that some persons may be led by complainant's scheme into foolishly buying more than they need, merely to get the stamps, and it is certain that in the end the premiums must be paid for by the public. But these are commercial, not judicial, considerations, and the remedy must be sought in the wisdom and experience of the citizen, not in the legislative interference. Ours is not a paternal government. The freedom of our institutions often permits the unwary to be entrapped, but the advantages derived from the resulting spirit of independence and enterprise far more than outweigh any evil that can follow the incidental abuses of liberty."

It thus appears that that court, even at that early day in the trading stamp and coupon business, recognized the fact that some people were led by the scheme into foolishly indulging in extravagant purchases merely to get the stamps. The court stated, however, that such fact was a commercial, not a judicial consideration, and that the remedy would have to be sought in the wisdom of the citizens. That idea is wholly foreign to the law as laid down by this court.

A further statement of the court that the freedom of our institutions even permits the unwary to be entrapped, but that the *advantages* derived from the resulting spirit of independence and enterprise far more outweigh any evil that could follow the incidental abuse of liberty, shows clearly that the court was indulging in a dissertation on policy, and not confining its decision to the question of power, the only question before the court. The paragraph quoted shows the error into which so many of the courts have fallen in considering trading stamp legislation. The time has long since passed when acts of this character can be disposed of on Cain's curt rejoinder, "Am I my brother's keeper?" particularly when, as here, the question before the court is of power.

Humes v. Ft. Smith (1899), 93 Fed. 857, was decided by the Circuit Court for the Western District of Arkansas, and in that case the court denied an injunction restraining the enforcement of an ordinance levying a tax not exceeding $1,000.00 a year on any person, firm, or corporation engaged in a gift enterprise, and not exceeding $500.00 on any person, firm or corporation aiding or patronizing the same. The ordinance defined gift enterprise as including the trading stamp business. The court said:

"Manifestly, the legislature of the state regarded this gift enterprise business as detrimental to the community. I do myself. I do not regard it as a legiti-

mate business. The legislature might have prohibited it altogether, in the exercise of its police power; but it chose to license it, and make it a source of revenue to the city, as it does some other deleterious occupations, with which, in my opinion the gift enterprise business should be classed. If right in this, the act of the city council, being clearly within the act of the legislature, is valid and binding, and neither the one nor the other infringes, I think, the provisions of the Fourteenth Amendment to the constitution of the United States."

Next followed *Ex Parte McKenna* (1899), 125 Calif. 429, in which the court held that a city authorized to license for regulation and revenue "all kinds of business, games, etc.," could not by ordinance impose a tax on merchants using trading stamps on the ground that it was a lottery, since a lottery was unlawful and could not be licensed, and further that where such city adopted a graduated license tax on merchants according to the amount of monthly sales, and imposes a license tax eight times the maximum tax imposed on any other merchant not using trading stamps, the tax was void because of a denial of the equal protection of the law.

In *Fleetwood v. Read* (1899), 21 Wash. 547, the court upheld the power of the city by ordinance to require a license fee of all merchants using trading stamps or coupons. At this point it may be stated that the Supreme Court of the State of Washington has adhered to that decision from that day to this date.

State v. Dalton (1900), 22 R. I. 77, held that a statute which prohibited a person who sells an article from giving to the purchaser, as part of the same transaction, a stamp or coupon or other device which entitled him to receive an additional article from a third person, was an unwarranted interference with individual liberty guaranteed by the Fourteenth Amendment to the constitution of the United States. That court limited the police power of the state of Rhode Island to the public welfare, public safety and the public morals. And again it appears that the *Gillson* case was the principal authority relied on.

State v. Walker (1901), 105 La. 494, held the title to a stamp act defective, and the act therefore void.

Commonwealth v. Sisson (1901), 178 Mass. 578, the court held that the act of 1884, prohibiting the sale of property on the representation that any other thing than that specifically stated to be the subject of the sale should be delivered, and the act of 1898 declaring that the provisions of the former act should apply to the giving of coupons which entitled the purchaser to other property from other persons, did not prohibit the giving of stamps or coupons to the purchasers of an article entitling such purchaser to go to the store of another where such stamps would be accepted in payment of articles on exhibition there for sale. It thus appears that that court did not con-

sider the trading stamp business, as has been commonly claimed, and that that case is not an authority in favor of appellees.

State v. Hawkins (1902), 95 Md. 133, involved the validity of an act of the legislature making it an offense to give, as an inducement for the sale of goods, any trading stamps to be redeemed by a person other than the seller, by anything uncertain, undetermined or unknown, to the purchaser of the goods, and prohibiting the seller from redeeming the trading stamps at any other place than where the sale was made, or in any other manner than of something certain and known to the purchaser. The defendant was a merchant giving stamps with purchases. The statute was upheld except in so far as it prevented the seller from redeeming the trading stamp at any other place than where the sale was made, without requiring as a part of the offense the element of chance. This case, likewise, cites as one of the principal authorities the *Gillson* case.

State ex rel. Madden v. Dycker (1902), 70 N. Y. Supp. 111, following the *Gillson* case, held unconstitutional a statute prohibiting the use of trading stamps which were to be redeemed by a third person.

State v. Shugert (1903), 138 Ala. 86, held that the business of selling trading stamps to merchants for use to their trade did not constitute a lottery or gift

enterprise within the statute denouncing lotteries, gift enterprises, etc.

Young v. Commonwealth (1903), 101 Va. 853, held that the statute prohibiting the use of trading stamps was in violation of the state constitution, and of the first section of the Fourteenth Amendment, citing as authority therefor the *Gillson* case. We note, however, that the court limited the police power of Virginia to the power to enact laws which pertained to the public safety, public health, and public morals, a considerably narrower view than taken by this court of the police power generally.

State v. Dodge (1904), 76 Vt. 197, held that a statute prohibiting the use of trading stamps by merchants was in contravention of the Fourteenth Amendment, following the *Gillson* case. In its opinion the court said:

"It is also said that this method of doing business is a device whereby dishonest traders are able to defraud ignorant and confiding purchasers, but this may be said of many methods of doing business, and may furnish a reason for regulating the business in a manner that will give greater protection to the purchaser; but it furnishes no reason for prohibiting the business."

Winston v. Beeson (1904), 135 N. C. 271, held that the business of selling trading stamps to merchants did not constitute a gift enterprise. Again the *Gillson* case appears as an authority for that conclusion.

Winston v. Hudson (1904), 135 N. C. 271, is to the same effect as the *Beeson* case.

Ex Parte Hutchinson (1904), 137 Fed. 949, was the opinion of Judge Hanford, of the then United States Circuit Court for the District of Washington, to the effect that an ordinance requiring a license fee of merchants selling and using trading stamps, was an abridgment of the privileges and immunities of citizens of the United States contrary to the Fourteenth Amendment.

State v. Ramseyer (1904), 73 N. H. 31, decided that a New Hampshire statute making it illegal for merchants to give trading stamps to their customers, was not a valid exercise of the state's police power, but unconstitutional as interfering with the right of acquiring and possessing property. Again the *Gillson* case appears as one of the authorities cited.

In the case of *Hewin v. Atlanta* (1905), 121 Ga. 731, it was decided that the furnishing of trading stamps was not "business," and hence, the city had no power by ordinance to tax the same. The court in that case described so aptly and so accurately just the necessary effect of the trading stamp business that we quote from its opinion:

"Attached to a business, the furnishing of stamps thrives, and profits result. Detached from the business, it instantly dies; and it dies, not by withering gradually away, but its death is instantaneous. The

business of the merchant can live without the sale of trading stamps, but the furnishing of trading stamps cannot live unless there is a business to which it can fasten, and from which it can draw its life blood."

Sperry & Hutchinson Co. v. Brady (1905), 134 Fed. 691, was an action for an injunction between rival trading stamp concerns.

In People v. Zimmerman (1905), 92 N. Y. Supp. 497, it was held, following the *Gillson* case, that an act of the legislature prohibiting dealing in trading stamps, coupons or tickets unless the stamp or device had legibly printed or written upon the face thereof the redeemable value thereof in money, and requiring the ticket or stamp to be redeemed in goods or money, at the option of the holder, was in violation of the constitution of the state. It is significant of the force of that decision that the court found nothing calling for legislative action by reason of the facts stated in the following quotation from its opinion:

"It may be that the trading stamp business tends to demoralize trade. It may be that people in moderate or straitened circumstances are prone to purchase beyond their means by the incitement of a gift after a stated amount has been expended. The farmer who attends an auction sale is often disposed to buy what he does not need, led along by the competition in the bidding, or by the fact that time is allowed on the purchase. If a grocer of the city of Rochester should reduce the price of flour or coffee below cost, it might tend to the demoralization of the

grocery trade in that city, and would certainly be exasperating to his competitors. These slight derelictions may be imprudent, but they are not the subject of legislative control. It is fundamental that the widest scope is accorded to the individual in the prosecution of his business, if only that business be lawful and be conducted in a lawful manner."

In *Oilure Mfg. Co. v. Pidduck-Ross Co.* (1905), 38 Wash. 137, the Supreme Court of Washington upheld a municipal ordinance requiring the payment of a license fee by persons transacting or soliciting business through the use or medium of trading stamps, and further declined to enforce a contract with reference to the use of trading stamps where the same was entered into in violation of an ordinance requiring the payment of a license fee for transacting business with such trading stamps.

In *Ex Parte Hutchinson* (1905), 137 Fed. 950, the United States Circuit Court for the Western District of Oregon, decided that an ordinance taxing trading stamp companies, and merchants using the same, was in violation of the Fourteenth Amendment to the constitution of the United States.

The case of *Sperry & Hutchinson Co. v. Temple* (1905), 137 Fed. 992, was an action for injunction between rival trading stamp companies.

In *Gamble v. Montgomery* (1905), 147 Ala. 682, the Supreme Court of Alabama upheld an ordinance imposing an occupation tax of $400.00 on merchants

using trading stamps as against a claim of violation of the constitution of the United States.

In *Ex Parte Drexel* (1905), 147 Cal. 763, the Supreme Court of California held that the use of trading stamps could not be forbidden by the legislature, citing as one of the principal authorities to that effect, the *Gillson* case.

In *Ex Parte West* (1905), 147 Cal. 774, the court followed its ruling in the *Drexel* case, *supra*.

In the case of *O'Keefe v. Sommerville* (1906), 190 Mass. 110, the constitution authorized the legislature to impose a tax on:

"Produce goods, wares, merchandise and commodities," and further provided that every person selling, giving or delivering trading stamps with the sale of any article by which the holder was entitled to receive any other article than those sold, should pay a tax.

The question was whether the tax above mentioned was within the constitutional provision, and it narrowed itself down to the inquiry whether the doing business as set forth in the statute was a "commodity," within the meaning of the constitution, and the court held that it was not. The case involved nothing more.

In *Denver v. Frueauff* (1907), 39 Colo. 20, the Supreme Court of Colorado held that an ordinance for-

bidding merchants from giving trading stamps in their business was not authorized by constitutional and statutory provisions making lotteries and gift enterprises unlawful, and that a city council could not, by arbitrarily defining the giving of trading stamps as a gift enterprise, bring it within the statutory definition of such enterprises. The contract between the trading stamp companies and the merchants is set forth in full in that case. We desire to call the court's attention specifically to a provision therein as follows:

"Said party of the second part also agrees to display signs furnished by said company which read, 'We Give S. & H. Green Trading Stamps,' or otherwise, in the windows and other prominent places about its stores, and agrees not to procure said stamps in any way except direct from said company, either during the term of this contract or any time; and also agrees to mention favorably the use of said stamps in all newspaper and other advertisements published by or for it; and not to use any other coupons, trading stamps, or similar device during the term of this contract, *and not to join in any combination of merchants for the purpose of discontinuing the use of said company's trading stamps.*"

If the trading stamp and coupon business has in it only the elements of legality and general benefit, it seems strange that the companies engaged in selling these stamps should find it necessary to bind their customers by contract not to join any combination of merchants for the purpose of discontinuing the

use of the company's stamps. If, in the practical conduct of business, the companies find it necessary so to do, there must be a reason for it, and as this court has heretofore said, it would be an extraordinary deduction from the Fourteenth Amendment to deny the power of the state to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law.

In *Montgomery v. Kelly* (1907), 142 Ala. 552, the Supreme Court of Alabama held that an ordinance requiring the payment of a license fee under penalty by a merchant who, having paid a privilege tax imposed upon his business, issues trading stamps in connection therewith, was a palpable attempt under the guise of a license tax, to fix a penalty on him for conducting his business in a certain way, and, therefore, unconstitutional, citing as one of the principal authorities the *Gillson* case. The court at the conclusion of the opinion said that so far as concerned the powers granted by the charter, the court had not deemed it necessary to go into an exhaustive discussion, although it was very apparent that the charter itself provided "that but one license shall be collected or required of any person, firm, or corporation, or for any particular trade, occupation, business, or profession using but one place of business in

carrying on such business, trade, occupation or profession." The case was, in fact, decided on the ground that the ordinance denied the equal protection of the law.

In *Leonard v. Bassindale* (1907), 46 Wash. 301, the Supreme Court of the State of Washington held that an act prohibiting the use of trading stamps violated the due process clause of the state constitution, citing, among others, as authority therefor, the *Gillson* case. The court, however, announced the decision in deference to the weight of authority, and not in consonance with its own view, as shown by the following quotation from the opinion:

"While we might, were the question one of first impression in the courts, entertain a different opinion, we have felt impelled to follow the great weight of authority, and hold the statute unconstitutional, especially in view of the fact that the Federal courts have shown an inclination to hold the statute in contravention of the constitution of the United States."

This case was expressly overruled by the same court, in the case of *State v. Pitney* (1914), 79 Wash. 608, where that court upheld the very act in question in the case at bar. A writ of error was taken from this court to the Supreme Court of the State of Washington in the *Pitney* case, and is pending before this court, as No. 618, for argument in connection with this case.

Commonwealth v. Gibson Co. (1907), 125 Ky. 440, the court held that a statute defining a trading stamp company to be one that gives premiums or valuable personal property in exchange for stamps or checks furnished to purchasers of merchandise, and requiring the payment of a license fee, did not include a company, conducting a general retail mercantile business, that gave to the cash purchasers of its goods, a check representing 4 per cent. of his purchase, which could be exchanged for articles in the store or for cash.

In the case of *State v. Sperry & Hutchinson Co.* (1910), 110 Minn. 378, the Supreme Court of Minnesota held that a trading stamp act passed by the legislature was a constitutional exercise of the police power so far as it prohibited the issuing of trading stamps or tickets to be redeemed in articles in any manner which might depend upon chance, uncertainty or contingency, but that the issuing and redeeming of trading stamps as carried on by the defendant company was not attended with such element of chance, uncertainty and contingency as to justify the restriction imposed by the act. The principal authority cited was the *Gillson* case.

The case of *District of Columbia v. Kraft* (1910), 35 App. D. C. 253, reaffirmed the doctrine of the case of *Lansburg v. District of Columbia*, 11 App. D. C.

512, hereinbefore mentioned. The court in its opinion calls attention to, and classifies the very large majority of all the trading stamp cases then decided, and after so doing so accurately characterizes the trading stamp business that we quote from its opinion the following:

"In the case at bar the advertising feature is a mere pretense; it is of the stamp dealer rather than of the merchant. To induce the purchase of stamps, the stamp company circulates many copies of its books, which contain a directory of the names and locations of the merchants under contract with it to deliver its stamps with purchases. It is a notice to these persons where they can procure stamps, and where and how they can procure the redemption of the same when obtained. This is of prime importance to the stamp company. The trading stamp concerns are not engaged in the advertising business, or as agents for advertisers. As said in the Lansburgh case, they 'are not merchants engaged in business, as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device. With no stock in trade, but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia, between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant. * * * The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of others, and partly through

fear of losing his own, if he declines.' We see no reason for withdrawing or qualifying the foregoing observations in the light of the evidence in this case, for, as said before, the businesses are the same, notwithstanding some immaterial differences. It has been argued that there was no evidence to show that the stamps were forced upon perhaps unwilling merchants. That is true, but the courts may take notice of evident conditions and results of trades and business. That merchants are unwilling to enter into the scheme, and regard the same as unjustifiable imposition, is borne out by the charge made in the same argument, that certain merchants of the District had employed counsel who had aided the corporation counsel in the preparation of these cases. This charge would not have been made, if unsupported by the facts, and it was not denied. The police power of Congress in the District of Columbia, upon the exercise of which this statute rests, is substantially the same under the Fifth Amendment as that which may be exercised by the states under the limitations of the Fourteenth Amendment. As was said in the Lansburgh case: 'The comprehensive scope of the police power, as exercised in our day, and under our form of constitutional government, has been developed by the process of evolution. Rapid increase in population, wonderful inventions, from time to time, followed by vast material development and advances in the arts of civilization, have introduced novel situations and begotten difficulties for the solution of one generation, that were unanticipated, and often undreamed of even, by the most advanced minds of the generation next preceding. As a necessary consequence, the boundaries of the police power in its application to the property, business, and personal liberty of the individual citizen have never been definitely settled, so as to furnish a certain guide for all cases that may present themselves for legislative or judicial determination.' This idea has been better expressed by Maeterlinck in 'The Life of the Bee,' in the form of a fundamental principle of social de-

velopment. He says: 'In proportion as a society organizes itself and rises in the scale, so does a shrinkage enter the private life of each one of its members. Where there is, it is the result only of a more and more complete sacrifice of the individual to the general interest.' "

In re Gregory (1911), 219 U. S. 210, was an original application for a writ of habeas corpus, the petitioner having been convicted of conducting a gift enterprise in the District of Columbia, the particular acts being conducting the trading stamp business. This court held that the statute defining gift enterprise was constitutional, that the lower court had jurisdiction, and denied the writ. In the course of the opinion Mr. Justice Hughes used the following language:

"But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, unless it be meant that no colorable question was presented; that on the agreed statement of facts, and viewing the statute as prohibiting transactions involving the element of chance there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated. Such a contention is without merit. *It is by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside the range of judicial consideration under the statute.*"

In the case of *State v. Caspare* (1911), 115 Md. 7 (decided Feb. 2, 1911), the court held that the trad-

ing stamp business could not be prohibited, and citing as authority therefor the *Gillson* case.

In "Opinion of Justices" (1911), 208 Mass. 607, the Supreme Judicial Court of Massachusetts, being asked by the legislature as to the constitutionality of a trading stamp act, held that the trading stamp business could not be prohibited. Such opinions are held advisory only, not binding.

In *Sperry & Hutchinson Co. v. Melton* (1911), 71 S. E. 19, the Supreme Court of Appeals of West Virginia upheld an act of the legislature taxing the business of issuing and redeeming trading stamps, and that the same was not in contravention of any provision of the Fourteenth Amendment.

In *Sperry & Hutchinson Co. v. Tacoma* (1911), 190 Fed. 682, Judge Hanford, sitting in the United States Circuit Court, again decided that the trading stamp business could not be licensed or taxed.

In the case of *Sperry & Hutchinson Co. v. Tacoma* (1912), 68 Wash. 254, the Supreme Court of Washington a third time sustained an ordinance requiring the payment of a license fee, by merchants using trading stamps, for the privilege of so doing. The court reviewed all its former decisions, and adhered to them, although the action was brought for the express purpose of seeking to have the court overrule them.

In the case of *Kane v. Segerstrom Piano Mfg. Co.* (1912), 118 Minn. 483, the Supreme Court of Minnesota held unconstitutional an act of the legislature to compel those offering stamps or coupons as an inducement to the public, or to prospective purchasers or customers in trade, to pay a certain amount of such inducement or offer in cash, if such prospective purchaser or customer so elect, in lieu of the sum promised in trade, basing its decision wholly on the *Gillson* case.

In *Sperry & Hutchinson Co. v. Owensboro* (1912), 151 Ky. 389, the Court of Appeals of Kentucky held that the business of a concern engaged in furnishing trading stamps to merchants could be taxed, that there appeared ample basis for classification, that a tax could not be levied in the exercise of the police power, but the business might be taxed a reasonable amount as other lawful business, but held the ordinance invalid because of the amount of the tax.

In the case of *Sperry & Hutchinson v. Tacoma* (1912), 199 Fed. 853, the action was to restrain the enforcement of an ordinance held valid in the case of *Sperry & Hutchinson Co. v. Tacoma* (*supra*), 68 Wash. 254, and the court sustained a plea of *res adjudicata*.

In the case of *Sperry & Hutchinson Co. v. Blue* (1912), 202 Fed. 82, the Circuit Court of Appeals for

the Fourth Circuit, upheld a statute imposing a license fee on all persons engaged in the trading stamp business, in the sum of $500.00 for each county in which the business was carried on. That case, as we have heretofore stated, is the only case we have been able to find in which the power to tax the trading stamp business was ever considered by any circuit court of appeals.

The case of *Little v. Tanner,* 208 Fed. 605 (1913), is the case at bar.

The case of *Van Deman & Lewis Co. v. Rast, Tax Collector* (1913), 214 Fed. 828, held invalid a statute of Florida requiring merchants using trading stamps to pay $500.00 per annum to the state, and $250.00 per annum to each county in which such business was carried on. That case is pending before this court as No. 318, for argument at the same time the case at bar will be presented. It may be stated in passing that the opinion in that case has followed in many instances the opinion in the case of *Little v. Tanner* almost verbatim.

In the case of *State ex rel. Hartigan v. Sperry & Hutchinson Co.* (1913), 94 Neb. 785, the Supreme Court of Nebraska held that the trading stamp business could not be made a gift enterprise, and that the statute in which it was attempted so to do was in violation of the Fourteenth Amendment to the Federal constitution.

In the case of *State v. Pitney* (1914), 79 Wash. 608, the Supreme Court of the State of Washington upheld the identical statute questioned in the case at bar, expressly overruled its former decision holding that the trading stamp business could not be prohibited, and directed the lower court to overrule a demurrer to the amended information. That case is pending before this court for argument at the same time the case at bar will be presented, its number being 618. The opinion of the Supreme Court is found on pages 8 to 13 of the printed record in that case. It is entirely too long to quote in this brief, but the statute was upheld against all contentions of a violation of the state constitution and of the Federal constitution.

State v. Pitney (1914), 80 Wash. 699, is the opinion of the Supreme Court affirming the judgment of conviction and sentence entered by the Superior Court pursuant to the mandate of the Supreme Court in the case last above mentioned, and is the identical case in which a writ of error was allowed, and which is pending for argument with the case at bar as No. 618.

These decisions reveal these facts: The following states, district and territory, have made efforts from 1888 to 1913 to prohibit the sale or use of trading stamps, or to license their use and require trading

stamp companies selling them to merchants, and merchants using the same, to contribute to the expense of government for that privilege, viz., New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Pennsylvania, Virginia, West Virginia, Maryland, District of Columbia, North Carolina, Georgia, Florida, Alabama, Louisiana, Kentucky, Tennessee, Nebraska, Montana, Arkansas, Colorado, California, Oregon, Washington, Territory of Hawaii.

They further show that the following states have sought to license either the business of selling such stamps or their use by merchants, to-wit: Tennessee, Arkansas, California twice, Washington four times, Georgia, Oregon, Alabama twice, Massachusetts, Kentucky twice, West Virginia, and Florida.

They further show that the following states, district and territory, have sought to prohibit their use: New York three times, Pennsylvania, Maryland three times, Massachusetts three times, Hawaii, Rhode Island, Alabama, Virginia, Vermont, North Carolina, New Hampshire, Colorado, Washington, Minnesota twice, District of Columbia and Nebraska.

They further show that decisions on the constitutionality of trading stamp and coupon statutes and ordinances have been rendered as follows: One in 1888, one in 1890, one in 1891, one in 1896, two in 1897, two in 1898, three in 1899, one in 1900, two in

1901, two in 1902, two in 1903, four in 1904, five in 1905, one in 1906, four in 1907, two in 1910, four in 1911, three in 1912, three in 1913.

It would seem that when 23 states, the District of Columbia and the Territory of Hawaii have attempted either to prohibit or to license the selling or use of trading stamps and coupons, that fact should be considered not lightly by the courts. It would further seem that when fourteen states, the District of Columbia and the Territory of Hawaii have sought to prohibit the use of trading stamps, that fact should demonstrate the necessity of doing away with a scheme which has ingrafted itself on business to the benefit of nobody except the men engaged in selling these trading stamps and coupons to the ultimate cost of the consumer, with the result that when the consumer buys one article he not only must pay for it but for something else in addition.

These cases prove conclusively that from 1888 to 1914, the legislatures of the majority of the states of the Union have been making persistent, continued, and deliberate attempts to rid business of a form of graft which has loaded itself upon the ultimate consumer, and for which he has to pay in some form or other. They show that prevailing, preponderant opinion is to the effect that the business itself, as well as the use of stamps and coupons, should be prohib-

ited; and if, as frequently said by this court, this universal sense of the people is a matter which this court cannot lightly overlook, and if, as said by this court in the Noble Bank case, the police power may be put forth in aid to all the great undertakings and that which is held by preponderant, prevailing opinion to be important and greatly and immediately necessary for the public welfare,—and those principles cannot be denied,—no reason appears why the trading stamp and coupon business in its entirety could not be constitutionally prohibited, why the merchants should not be relieved of the necessity of carrying on the business, or why the public at large should not be relieved of the necessity of paying the proportionate cost of carrying on such business as a part of each article purchased.

The court will further notice, as we have frequently called to its attention, that the cases holding that the trading stamp business could not be prohibited, were almost without exception all founded upon the *Gillson* case. Two reasons are clearly apparent which show that the position taken is not sound. In the first place, the transaction involved in the *Gillson* case was merely the gift, at the time of purchase, of a china cup and saucer. There was no form of stamp or coupon used in that case to which the customer was compelled to add before he could

benefit thereby. That case is not, and cannot reasonably be, considered authority to the effect that the trading stamp and coupon business cannot be prohibited, a business deliberately designed to compel the customer always to purchase something more in order to get the necessary stamps and coupons for redemption.

Again, many of these cases show how greatly the respective state courts have limited the power of the legislature of their respective states, commonly known as police power, when compared with the efficacy ascribed to that power by this court so far as concerns the Federal constitution. If the state courts hold the police power possessed by the legislatures of their respective states less effective and less powerful than this court holds that power to be, that is a matter of local law on which the decision of the state courts is binding. And insofar therefor as such limitations have been placed upon the police power of the legislatures of the various states by the courts of those states, we have on that ground a distinction which cannot be overlooked.

On the other hand, the Supreme Court of the State of Washington has at all times ascribed to the legislature the full extent of police power as that term has been limited by this court. The contrast between that power as possessed by the legislatures of many

of the states holding the police power insufficient to prohibit the trading stamp business or the use of stamps and coupons, and the State of Washington, is very forcibly and aptly shown in the case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, hereinbefore mentioned, in which the court upheld the constitutionality of the Workmen's Compensation Act, where, in speaking generally of the police power, the court said (page 177):

"The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things? but it is found rather in the inquiry, *Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby?* The legislature cannot, of course, without violating this clause of the constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise. This it does under the police power: 'The power inherent in every sovereignty * * * the power to govern men and things.' It is unnecessary to discuss the origin, nature or extent of this power. It is sufficient to say that, by means of it the legislature exercises a supervision over matters affecting the commonwealth and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may prescribe regulations promoting the health, peace,

morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity.' In fine, when reduced to its ultimate and final analysis, the police power is the power to govern." (Italics ours.)

Again, on page 195, the court said:

"That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps, more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is *economically, sociologically,* and *morally* sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern *statesmen,* jurists, and *economic writers* who have voiced their opinions on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more of South American republics. Indeed, so universal is the conception that to assert to the contrary is to turn the fact against the *enlightened opinion of mankind.*

The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and where there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, *having in its support these economic and moral considerations*, is not unconstitutional for the reasons suggested upon this branch of the argument." (Italics ours.)

Again, the Supreme Court of the State of Washington, when the question of the power of the legislature to prohibit the trading stamp and coupon business first came before it, in the case of *Leonard v. Bassindale*, 46 Wash. 301, deferred to the weight of authority although it expressed its view that the power questioned was actually possessed by the legislature.

In the case of *State v. Pitney*, 79 Wash. 608, the court upheld the identical statute in question, expressly overruled the *Bassindale* case, called attention to a number of reasons which in its opinion were sufficient to support the legislation in question, and then said:

"The fact hypothetically stated, as well as others that might be presumed to have existed, would bring the present case within the holdings of the two cases last cited. That the law was not passed in response to 'sporadic impulse or exurberant displays of emotion,' but embodied a settled conviction that the use of trading stamps is harmful, is evidenced by

the fact that the legislature at two different sessions has legislated against their use, first in 1905 (Laws of 1905, p. 374) and second, in 1913, the present law. We think this act of the legislature falls within the scope of the police power as it is now understood and defined by the courts, and, therefore, the legislature did not exceed its power or offend against any constitutional provision, either state or Federal, in promulgating the regulations or prohibitions found in the act. This conclusion, it must be admitted, is not in harmony with the great weight of authority, numerically speaking. But many, if not most, of the decisions that have held trading stamp laws inimical to the due process of law clause found in the constitutions *were decided when the police power was defined as having a more limited scope than it has at the present time.*" (Italics ours.)

Again, the court will recall that the *Gillson* case was decided in 1888, that it is the first reported instance of the passage of trading stamp or coupon legislation. It might very well be that at the time that decision was rendered there was no necessity for the legislation in question, although it may be suggested that the question of necessity was one for determination solely by the legislature unless its judgment thereon was utterly unreasonable and arbitrary, and palpably wrong. But all that is not sufficient to condemn the act in question. In the case of *Commonwealth v. Strauss*, 191 Mass. 545, the court said:

"Legislation should be adapted to existing conditions. A few years ago there was no occasion for such an enactment."

In the case of *Holden v. Hardy*, 169 U. S. 366, 387, this court, after calling attention to acts passed by various legislatures pursuant to the police power, said:

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise."

In the case of *Dobbin v. Los Angeles*, 195 U. S. 223, 238, this court said:

"In other words, the right to exercise the police power is a continuing one, and a business lawful today may be, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare and be required to yield to the public good."

Again, it appears that many of the cases holding that the trading stamp and coupon business could not be prohibited were founded, in part at least, upon the view that such legislation was unwise and disadvantageous, a matter with which the courts had no concern. A number of the decisions are to the effect that the legislation is paternal, and that it should not be permitted to stand for that reason, a view entirely too narrow to meet the enlightened view of that subject held by this court. The courts seemed to be of

the impression that the welfare of the public depended upon their action, a view not at all in harmony with that expressed by this court in *M., K. & T. Ry. Co. v. May,* 194 U. S. 267, where Mr. Justice Holmes said:

"It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

It will, we apprehend, not be contended that the trading stamp and coupon business is possessed of a higher degree of legitimacy than the banking business, and will be admitted that the right to engage in the former is not less subject to legislative action than the latter. In such view the following excerpt from the decision of this court in the case of *Noble State Bank v. Haskell,* 219 U. S. 104, 113, is particularly applicable:

"We are of the opinion that it (the state) may go on from regulation (of the banking business) to prohibition, except upon such conditions as it may prescribe."

It cannot be seriously disputed that a court falls into serious error when it adjudges that a business is beyond legislative interference because the business, considered alone and abstractly, may be legal without considering the fact that evils ordinarily attend or ordinarily follow its prosecution, and that they are of such character and effect as to warrant the legislature in prohibiting the business in order to

prevent such evils. The complex conditions of society have frequently called forth remedial, regulative and prohibitory legislation, which has been upheld by this court when, if a scholastic decision only on the constitutionality of such acts has been rendered, they would unquestionably have been held void. The courts holding the trading stamp and coupon business beyond legislative interference have pressed constitutional provisions to a drily logically extreme and have overlooked the fact that they must consider all such laws in the light of the judgment which another department of government is entitled to indulge in, particularly in view of the fact that such other department is charged by the constitution with the duty of exercising that judgment. Such courts have also overlooked the fact that in deciding great constitutional questions some play must be allowed for the joints of the machine; that the legislatures in passing such acts are compelled to deal with a condition of affairs as it actually exists, and that what is wise or best is not often easily discernible, and that according to the numerous decisions of this court such acts must be upheld unless it clearly and unmistakably appears that they are wholly unreasonable, utterly arbitrary, and palpably beyond the power of the legislature.

It follows, therefore, that the legislature had the power to prohibit the trading stamp business in its

entirety. Having that power, it is immaterial whether it be exercised directly by a prohibition to that effect, or indirectly by making the business so unprofitable that it could not be conducted, or if conducted would yield a substantial return to the state's revenue.

In the case of *McCray v. United States*, 195 U. S. 27, 63, this court upheld a tax of ten cents a pound imposed by Congress upon the sale of oleomargarine. It was argued that the power to tax should be denied because of the effect of the exercise of that power. This court declined to interfere with a conceded power to tax because of the extent of its exercise. It was then argued that the tax was so large as to *destroy the business* of manufacturing oleomargarine and thus deprived the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the constitution, the tax laws were void because they violated those fundamental rights which it was the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied, though none the less potential, guaranties, or in any event to be within the protection of the due process clause of the Fifth Amendment. Answering the contention, the court conceded, for the sake of argument only, the premise of fact upon which the

proposition was based, and also for the same purpose that, although a particular exercise of power by Congress was not restrained by any express limitation of the constitution, if by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, it would be the duty of the judiciary to hold such acts to be void upon the assumption that the constitution, by necessary implication, forbade them. The court then proceeded:

"Such concession, however, is not controlling in this case. *This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled.* As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exercise of their police powers, without violating the due process clause of the Fourteenth Amendment, *absolutely prohibit the sale of the article.* It hence results, that, even although it may be true that the effects of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to void an act of Congress exerting the taxing

power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

"Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which *could not be rightfully destroyed consistently with the principles of freedom and justice upon which the constitution rests*, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; *that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.*" (Italics ours.)

In the case of *Quong Wing v. Kirkendall*, 223 U. S. 59, this court upheld a license tax exacted from a person operating a hand laundry other than the steam laundry business, with a proviso that it should not be applied to women so engaged where not more than two women were employed. In the course of its opinion this court said:

"A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to *favor* certain industries or forms of industry. * * * If the state sees fit to *encourage* steam laundries *and discourage* hand laundries, that is its own affair." (Italics ours.)

In the case of *Hammon Packing Co. v. Montana,* 233 U. S. 331, this court, in upholding a license tax on the business of selling oleomargarine, speaking of the power of the legislature, said:

"It may express and carry out its policy as well in a *revenue* as in a *police* law."

If appellees shall argue that, even if it be conceded that the legislature could abolish the business of furnishing trading stamps and coupons to merchants for use in their trade, it could not lawfully abolish the use of these stamps and coupons by the merchants, then we answer that if the legislature had the former power, it had the power to make its act effective. In other words, if the legislature can lawfully abolish the business of furnishing trading stamps and coupons to merchants, it can put its abolition in such form as will make it effective. To illustrate: Suppose the legislature had merely prohibited the business of furnishing trading stamps and coupons to merchants; what would happen? The act would have been wholly ineffective because it could have been evaded so completely as to make its enforcement impossible. All the trading stamp companies would have had to do to evade it would be to have the merchants ostensibly redeem their own stamps, the trading stamp companies conducting a clearing house for their redemption, or probably more accurately speaking, selling to

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the merchants the alleged premiums used in redemption of the stamps at a profit corresponding to the profit made by the companies from the sale of the stamps direct. The power of the legislature to make this act effective cannot be questioned.

In the case of *Booth v. Illinois*, 184 U. S. 425, 430, this court upheld a statute of Illinois prohibiting options to buy or sell grain or other commodities at a future time. It was objected that the statute prohibited not only gambling transactions, but legitimate business transactions as well. This court said:

"It must be assumed that the legislature was of the opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be obtained, and which it was competent for the state to accomplish."

In the case of *Otis & Gazzam v. Parker*, 187 U. S. 606, 609, this court said:

"If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'"

In *Sturgis & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320, this court upheld an act prohibiting the employment of children under the age of sixteen years in various hazardous occupations, although the stat-

ute was so construed by the highest court of the state that a violation of its provisions gave a right of action on behalf of the illegally employed minor for injury in the course of such employment, even if the employer acted in good faith, relying upon the representations of the minor that he was over sixteen. On the point under consideration this court said:

"It is said that being over fourteen, he (defendant in error) at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the state, in securing the safety of the young, to prohibit such employment altogether, it could select means appropriate to make its prohibition effective, and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government. (Citing authorities.) And where, as here, such legislation has reasonable relation to a purpose which the state was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law."

In paragraph six of the amended bill of complaint (Record, p. 32), appellees plead that at the time of the filing of the amended bill they had on hand a large amount of trading stamps, and that if they were prevented by law from disposing of the same, they would suffer great and irreparable loss. They also alleged that a number of manufacturers of products were in the habit of enclosing in the packages in which such merchandise was put up for market, coupons, certifi-

cates, tickets, and other premium tokens, and that at the time of the filing of the amended bill of complaint they had on their shelves or in their stores large quantities of various kinds of merchandise in which such coupons, certificates, and premium tokens were packed. The court will bear in mind that the act was passed by the House March 4th, 1913, by the Senate March 12th, 1913, and approved by the Governor March 20th, 1913 (Record, p. 4), and that it became effective June 13th, 1913, (Record, p. 5); and will further notice that the bill of complaint was sworn to and filed on the 7th day of July, 1913, (Record, pp. 39, 40). The question suggested in *Bartemeyer v. Iowa*, 18 Wall. 129, and in *Eberle v. Michigan*, 232 U. S. 700, in which it was suggested that a statute absolutely prohibiting the sale of property in existence at the time of the *passage of the law* would amount to confiscation, and be void as depriving the owner of his property without due process of law, is not in this record. The court will notice that the allegation is to the effect that at the time of the filing of the amended bill of complaint the appellees had on hand the stamps and packages of merchandise, not at the time of the passage of the law. It may very well be, so far as we can ascertain from the amended bill of complaint, that these stamps were secured, and this merchandise purchased, after the passage and approval of the act and after the knowledge of its passage and approval

by the appellees for the purpose of making just such a contention. We respectfully suggest that if that be the fact, and nothing appears in the amended bill of complaint to negative that idea, the appellees are entitled to no relief in a court of equity. Otherwise, prohibitive laws never could take effect. Any one engaged in a prohibited business could, at whatever date in the future the prohibition became operative by terms of the act, defeat the same by purchasing a stock of the prohibited articles after its passage and approval, after knowledge of that fact, and before the date fixed for its operation.

In paragraph six of the amended bill of complaint (Record, p. 32), appellees allege that those among their number using trading stamps and coupons had entered into contracts for the use of such premium advertising system, so-called, which contracts were in force at the time of the passage and going into effect of the act. We are not certain as to just what objection to the act appellees see in that allegation. It is fundamental that the police power is not circumscribed by reason of existing contracts. Otherwise, the legislature could be prohibited from exercising its acknowledged power.

In *L. & N. Rd. Co. v. Mottley*, 219 U. S. 467, it appeared that Mottley and wife received serious injuries by reason of the negligence of the railroad company. A settlement was made by the railroad company pay-

ing a certain sum of money and entering into a contract to furnish Mottley and wife an annual pass, and renew the same annually during their lives. The money was paid, the passes given, and renewed annually until the passage of the Carmack Amendment prohibiting the giving of transportation, except in certain cases, of which this was not one, for anything but money. Thereupon the railroad company refused to renew the pass. An action was brought against it, and this court upheld the contention of the railroad company because of the fundamental principle that contracts, whenever made, are subject to the power of the legislature within its conceded power to regulate, or as a result of police power. The result to the injured party is a matter of no moment, because the contract is made subject to that conceded power.

In the case of *Seattle v. Hurst*, 50 Wash. 424, it appeared that Hurst's employer had entered into a contract with certain of the railroad companies maintaining a station in the city of Seattle by the terms of which the employer was given the exclusive right to solicit passengers in the depot. The city council thereafter, during the existence of that contract and pursuant to its statutory power to regulate the solicitation of passengers in depots, prohibited the same. Hurst having violated the ordinance, was arrested, charged with its violation, convicted, and sentenced

by the lower court, and the conviction was upheld by the supreme court. It was urged in the supreme court that the right to solicit according to the terms of the contract could not be interfered with by the city. The supreme court dismissed the contention in this curt sentence:

"All contracts are subject to this power, the exercise of which is neither abridged nor delayed by reason of existing contracts."

Appellees contend that the act in question impairs the obligation of their contracts with their customers to continue the giving of trading stamps. The court will notice that they are not prohibited from so doing except on the conditions stated. It is fundamental, therefore, that the obligation of these contracts has not been impaired by the legislation in question, because the obligation of the contract is its binding force on the party who makes it. *McCracken v. Hayward*, 2 How. 608, 611. In that case this court said:

"The obligation of a contract consists in its binding force on the party who makes it."

In the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 582, this court said:

"After a careful examination of the questions adjudged by this court, they seem not to have decided in any case that the contract is impaired, within the meaning of the Federal constitution, where the action of the state has not been on a contract."

In the case of *Kehrer v. Stewart*, 197 U. S. 60, this court upheld an act of the state of Georgia imposing

a tax of $200.00 upon resident managing agents of non-resident meat-packing houses. Kehrer was such a resident agent under contract to represent Nelson Morris & Company. He contended that the act impaired the obligation of his contract. This court answered that contention in very brief terms, as follows (page 70):

"The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employee to serve for a specific sum. His contract remains entirely undisturbed. There was no stipulation for an employment for a definite period; and if there were, it is inconceivable that the state should lose this right of taxation by the fact that the party taxed had entered into an engagement with his employer for a definite period. The tax is an incident to the business, and probably might, under the terms of their contract, be charged up against the employer as one of the necessary expenses of carrying it on."

But be that as it may, this act is a valid exercise of the police power, and it is fundamental, of course, that the police power is not limited by existing contracts.

In conclusion, we respectfully submit that the decree should be reversed.

Respectfully submitted,

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Solicitors for Appellants.

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No. 595

In the Supreme Court of the United States

October Term, 1914

W. V. TANNER, as Attorney General of the State of Washington; GEORGE H. CRANDALL, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. EVENSON, as County Treasurer of Spokane County, State of Washington,

Appellants,

vs.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, doing business as RYAN & OATHOUT, *et al.*,

Appellees.

No. 595 22

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATE FOR THE EASTERN DISTRICT OF WASHINGTON.

APPELLANTS' REPLY BRIEF

W. V. TANNER,
Attorney General of the State of Washington,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

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CASH DISCOUNT OR AN ADVERTISEMENT.

Appellees' argument is based on two propositions: first, that by means of trading stamps customers are given a discount, and, second, that such stamps are an advertisement.

In the case of *Muller vs. Oregon*, 208 U. S. 412, Mr. Justice Brewer, commenting upon the state of public opinion with reference to the necessity

of the legislation there attacked, and the effect to be given to the same, says:

> "In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin."

The question here involved has engaged the attention of eminent and practical men not less than that involved in the above case. Since writing our brief, several articles have come to our attention which so accurately deal with the subject, that we have felt impelled to bring them to the attention of this court. The first is an article entitled, "Premiums in Retail Trade," appearing in Volume 13, No. 4, page 574 of the September, 1905, issue of the Journal of Political Economy, written by I. M. Rubinow, who was examiner in the United States Civil Service Commission during the years 1903-1904, economic expert in the Bureau of Statistics of the United States Department of Agriculture during the years 1904-1907, librarian of the Bureau of Statistics of the United States Department of Commerce and Labor during the years 1907-1908, and

since that time has devoted his attention largely to writing on subjects of political economy. The following opening sentences of that article are striking:

> "Within the last year or two the 'premium craze,' like a moral epidemic, has spread all over the country. Scarcely a middle-class or wage-worker's family may be found, at least east of the Mississippi, where some kind of coupons are not saved and some kind of a free prize not expected."

He calls attention to a practice which prevailed some years prior within certain districts of the New York East Side, which was exceedingly profitable to the dealers engaged therein, namely, to give, with every pound of tea or coffee purchased, a free prize, some ware or household utensil, the value of which was usually declared to be greater than the total price paid for the tea, coffee and the prize. He says the prices paid to such dealers for tea and coffee were naturally considerably higher than prices for similar commodities elsewhere in the country; that the practice resulted in the peculiar phenomenon of a combined price for two articles, absolutely unrelated to each other, and the purchase of cheap, and often *unnecessary*, goods simultaneously with the goods desired. He calls attention to the fact that there can hardly be any question that

the real burden of regular advertising falls upon the consumer, that a similar development may be noticed in the premium system, to the enormous cost of advertising, to the fact that the combined price for two commodities entirely different so presents itself as to baffle the most careful inquiry into the nature of value, to the violent opposition which the premium advertising system called forth, to the grounds of such objections [many of which appear in our brief], to the fact that many of such objections are well founded, and that the premium system would vanish only with competition itself. He adds:

> "And competition, according to the firm conviction of 'the man in the street,' must be advantageous to the public. And, of course, it is. Witness the cracked china and gaudy statuettes in the homes of the public."

He then calls attention to the advent of the trading stamp companies as follows:

> "This is an era of consolidation; also substitution. And so both forces have started to play in the domain of the premiums, and the result has been the much discussed 'trading stamp.' This device was heralded as the greatest invention of the competitive principle. And perhaps it was that for some time. It is the more interesting, therefore, to observe how this method has brought the whole system of premiums *ad absurdum*, and, like many other methods of extreme competition, has destroyed its own

usefulness to anybody, and, while causing great losses to many, was profitable to a very few middlemen."

Concerning the effect of the trading stamp, he says:

"The writer had the opportunity to observe the growth of the trading-stamp mania in New York from its very incipiency, and saw its phenomenal success as well as its final fiasco. In the beginning the advantage to the enterprising dealer was not a small one. But neither the dealer nor the trading-stamp schemer foresaw the results which were inevitable. Competition arose in the very method of competition. The trading-stamp idea could not be patented. The dealers who were left on the outside had to imitate as a matter of self-defense. Besides, the high profits of the trading-stamp man could not help attracting attention. If the green trading-stamps proved a bowling success, why not red, blue, yellow, and violet ones? A number of paralleled systems sprung up. Under the influence of the demands of the stamp-mad public, no dealer could afford to go without premiums. As a final result, some *status quo* was established, and the retail dealers, on the whole, found themselves with the same circle of purchasers, but with an additional expense for stamps forced upon them. The stamps lost their dynamic force—the acquisition of custom—as they increased the total purchases but little, but became necessary for the retention even of the established trade."

He comments on the fact that the small retailers readily adopted the system, and thereby built

up the means of their own destruction, in that the trading stamp was adopted by the large central department store which, by reason of the fact that it bought such a vast quantity of stamps, could purchase them at a considerably reduced figure, that later the department store gave two stamps where formerly it gave one, to the destruction of the small dealer, and that the trading stamp men derived the greatest benefit from the transaction. He details his own experience as a victim of the craze as follows:

> "The writer of these lines was, for a time at least, a victim of this craze, and has quite a respectable piece of cut glass to show for it. The retail value of this premium seems to be about three or four dollars, and it was received for one book only (*i. e.*, one thousand stamps, which means a total purchase of $100.00). Judging from this example, the trading-stamp man should have received about four or five dollars for these one thousand stamps, and the stamps would represent one-half cent on a ten-cent purchase, or five per cent. discount. And, as a matter of fact, whether true or not (and we think not), that was the value which the public thought the stamps actually had. Yet if the lavishness with which these stamps have been distributed is taken into consideration, and that at least one department store doubled the number of stamps once or twice each week, it certainly must not be supposed that any system could or would introduce a ten per cent. discount on each and every purchase. The truth of the matter is that, in getting his valuable

> cut-glass premium very early in the history of the trading stamp idea, the writer was 'let in on the ground floor,' as it were, and that the actual value of the stamps was much lower, as is claimed by some—only one-tenth of a cent—in which case it represents a discount of one per cent. only. The value of the premium was rapidly reduced. The enormous quantity of stamps lost or left unused by the impatient consumers was so much additional pure profit to the 'man with an idea'."

He then calls attention to the fact that the trading stamp idea is still spreading, though it is rapidly approaching the moment of total discredit in the eyes of the public, and the necessity of a better system of trade and distribution where the advantages and profits of retail trade will remain in the hands of the consumers, not in the shape of *quasi-free* premiums and prizes, but in the shape of perceptible reductions in the retail prices.

A due regard for reasonable length prevents us from reproducing the article in full as a part of this brief proper, but as a matter of convenience, if Your Honors shall be interested in the full article, we have reproduced it in Appendix "A" hereto.

In the November, 1913, issue of the Annals of the American Academy of Political and Social Science, Vol. 50, No. 139, page 74, appeared an article, entitled, "The Cost of Distributing Gro-

ceries," by E. M. Patterson, Ph. D., of the Wharton School of Finance and Commerce, University of Pennsylvania. Dr. Patterson calls attention to the three ways in which the grocery business is carried on: first, by the independent proprietor; second, by a group of chain-stores; and, third, by a group of independent groceries organized into associations to promote their common interests. He then says (page 77):

> "This somewhat lengthy description justifies the assertion that the ordinary method of distributing groceries is expensive both to the grocer and to the general public. The goods pass from the manufacturer through the hands of the wholesalers who adds ten per cent. to the price, and then to the retailer who adds an additional twenty per cent. before they reach the consumer. The twenty per cent. profit of the retailer is not sufficient for those who are hopelessly incompetent, but is more than would be necessary under a more efficient regime. The buying public is paying a price that is fixed by the needs of what the technical economist would call the 'marginal grocer' whose ability is small. He exists because of the demand for his services and because of the ease of entering the business as described above. To these reasons for the expense of grocery distribution are to be added careless purchases by the housewife, the cost of an elaborate order and delivery service, *the burden of trading stamps and premiums* and numerous other items that need not be enumerated in detail." *(Italics ours.)*

Again, on page 79, he says:

> "The organization of the grocery business as we have described it is thus strongly defended. Its two aspects that affect the cost of goods to the consumer are (1) the distribution of goods only through both the wholesaler and the retailer, and (2) the maintenance, if possible, of a retail price determined by the manufacturer. *To this may be added the practice of offering trading stamps and premiums as trade inducements*, but this is not such an essential part of the general system as the other two features." *(Italics ours.)*

Another article, entitled "The Fallacy of the Trading Stamp," written by Arno Dosch, an experienced newspaper man, appeared in the August, 1911, number of Pearson's Magazine. Prefatory to the article, the Editor of Pearson's called attention to the vast expenditure of money made necessary by the trading stamp and coupon, and to the fact that it must be paid by the ultimate consumer in the added price of the merchandise bought. In the course of the article, the following appears:

> "In business, every transaction adds something to the final cost paid by the consumer. Some transactions are necessary; others not. Ordinarily there must be at least the producer, the manufacturer, the jobber and the retailer. If two or more of these can be combined the consumer is usually the gainer. If any are added, the consumer must pay their margin of profit. Money-makers are constantly trying to wedge in somewhere to get a slice of profit, and

competition is constantly forcing the number of transactions down to the minimum. The friction keeps business conditions healthy. But, suppose a new middleman comes along who cannot be thrown off by competition. Suppose he wedges himself in between the retailer and the consumer and has convinced the consumer he is a friend, how is he to be thrown off? Suppose he wedges in on all classes of business. That is what the trading stamp companies have done. They say they reduce the price of goods, but how can they, when their margin of profit must also be paid? And that margin has been considerable. Sperry and Hutchinson alone have made millions. They have in their employ three thousand people, most of them well paid. Their salaries must also be met by the consumer. Argue any way you like, you can't get past the fact of this additional load of expense."
On the matter of advertisement, he says:

"Trading stamps constitute an inducement to buy, but they are not an advertisement. They induce purchasers to buy at a certain store, but advertise none of the articles it contains. They act as a lure, not an advertisement.

"The trading stamp companies have shown the fallacy in their own argument. In pushing their business as far as possible they have pushed themselves, logically speaking, into a corner. In the city of Buffalo they have been so successful that there is only one large store now which does not give trading stamps. And, where practically all give trading stamps, wherein lies the value of the advertisement?

"Meanwhile the people of Buffalo must pay all expenses and a profit to the trading stamp middleman. It must come out of their pockets. The final consumer always pays."

For the reasons above stated, the foregoing article is likewise attached and will be found in Appendix "A."

In order to place before this court not a one-sided view of the subject, we desire to call Your Honors' attention to Chapter 13, entitled "Premium Giving," of a book published by Byxbee Publishing Company of Chicago, in 1911, entitled, "Store Management Complete," by Frank Farrington, the author of a number of books relating to retail business. In the course of the article he says:

> "If men were the buyers and shoppers, the result might, I say MIGHT be in favor of the cash rebate, but women do most of the buying and women are attracted much more by a display of alluring gifts, premium goods, than by the promise of money at an indefinite day. *Besides, the premium goods can be listed at a value quite a bit higher than their actual cost which will make them appeal all the better as an attraction.*" (Italics ours.)

On the point urged by appellees, that all dealers are not compelled to use trading stamps and coupons, we call the court's attention to the following paragraph in the above article:

> "And any agreement among merchants to abolish premiums should be made to include ALL merchants in town. Otherwise some little fellow who has limited capital but unlimited ability and ambition may take advantage of his

> exemption from any such agreement and begin to grow at an unexpected pace."

That the lure of the trading stamp is well played upon, appears in the following paragraph of the same article:

> "It is not well to put a close time limit on the coupons. It discourages a customer to note that there are only a few weeks or even months in which to get enough coupons to win a premium. And as the end of the time draws near it will be difficult to interest new people in the plan."

Later in the article Mr. Farrington considers the kind of articles best adapted to the premium system, and says that articles of utility have not as much premium value as articles which are more or less luxuries; that the latter appeal most to women; that cut glass, chinaware, silverware, etc., are preferable. His conclusion is:

> "And then goods of these kinds commonly retail at a large profit so that the value of the premium can be listed *well above its actual cost to the merchant.*" (Italics ours.)

This admission alone shows just how little merit there is in the contention that the consumer is given a discount by means of trading stamps and coupons.

We have likewise reproduced this chapter in Appendix "A" for the reasons above stated.

The views of these men above set forth will serve to give this court a very accurate idea of the results of the use of trading stamps, as well as the means commonly and necessarily adopted in their use. With these views in mind as a premise, let us see what conclusions naturally follow. Mr. Rubinow's article, all unconsciously to him no doubt, suggests the possibility of the trading stamp. We refer to that portion of his article where he called attention to the giving of double stamps by department stores. Although he did not see it, the trading stamp men did, and while the following are the facts let us, in order not to be thought going beyond the record, suggest the inquiry whether the court could rationally conceive them to be the facts, and if so, whether they, with other reasons mentioned in our former brief, justify the act.

Suppose the legislature found that the trading stamp men, in order to introduce their use, were accustomed to enter a town or community and make a contract with the most prosperous merchant they could induce to do so, to the effect that he should use the stamps, that the company should furnish them free of charge or at a greatly reduced rate, and pay him a percentage of all gross sales of trading stamps by them to other merchants in the same

city or community. The court will bear in mind that Mr. Farrington called attention to the fact that when once the use of trading stamps is started, all merchants likewise must use them. Suppose the legislature further learned that the favored merchant, in order to stimulate the use of trading stamps by his less fortunate competitors, would, on certain fixed and designated days, give two trading stamps where originally he gave one. Would not such facts be sufficient to warrant the legislature in prohibiting the use of a scheme whereby the cost of all necessaries of life were inevitably increased, with no corresponding benefit to the consumer? Bearing in mind that Mr. Rubinow has called attention to the enormous profits of the trading stamp people, and to the fact that a large number of competitive companies were engaged in the same business, suppose further the legislature found that the other trading stamp concerns were adopting the same tactics, with the result that all merchants in the city or community were necessarily compelled to use trading stamps, whether they would or not. The inevitable result of such a system would be to place upon the shoulders of the consumer the added cost of the necessaries of life, to the profit only of the middleman who had forced himself between the manufacturer and the consumer, a middleman who

produced nothing of value but who, nevertheless, had so fastened himself upon the business that he levied tribute upon every purchase, however large or small it might be.

We are not indulging in fancy. The Supreme Court of the State of Washington, which was acquainted with local conditions, said on that point:

> "The legislature might reasonbly have believed that the stamp companies, in order to cause the stamps to be used in a certain city, would contract with one merchant for their use, agreeing to pay him a percentage of the sums collected by them from other merchants, and then use the first contract so secured to force other merchants into using the stamps, or suffer loss of trade by failure so to do. In other words, that legitimate business was virtually coerced into paying tribute to the stamp company, a nonproducer of wealth or value."

State vs. Pitney, 79 Wash. 608, 613.

It is said, however, that the trading stamp is a discount to the consumer. All disinterested parties agree that its cost is ultimately paid by the consumer in some form or other. In other words, the added expense of the merchant by reason of the trading stamp is paid by the consumer, and, out of that added cost, must be paid the cost of the premiums, the expense of conducting the trading stamp company's business, and their profits. Consequent-

ly, instead of getting a discount, the consumer receives only a portion of the *added* cost. The fallacy of the argument is so apparent that it needs no further comment.

However, should it be said that this argument applies only to merchants patronizing trading stamp companies, and not to merchants who conduct their own premium advertising system, it may be suggested that no distinction has been made by any person in the matter of added cost to the consumer, by reason of that fact. Every additional transaction involved in carrying on business adds its proportionate share to the overhead expense which the merchant must add to his price. It is said, however, that the merchant can do business on a considerably smaller margin of profit by use of trading stamps than without them, because they so largely increase his business. Again, let us refer to Mr. Rubinow's article where he found that the trading stamps in New York City had lost their dynamic force—the acquisition of trade—and that it was necessary for the merchants to continue their use for the purpose of retaining even an *established* trade, and that Mr. Dosch found the same condition existing in Buffalo. It is not necessary to cite instances of this fact. A moment's reflection shows the fallacy of the argument.

The courts have not all failed to appreciate the fallacy of this claim. In the case of *Lansburg vs. District of Columbia*, 11 App. D. C. 512, the court answered a similar argument addressed to it, as follows:

> "There is not a shadow of rational foundation for the Stamp Company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued and its contracts faithfully performed, its inevitable result would be, as in all unnecessary interventions of third persons, or 'middlemen,' between producer and consumer, an increase of cost to the latter."

The same court quoted the above language with approval in *District of Columbia vs. Kraft*, 35 App. D. C. 253.

Appellees further contend that the trading stamp is an advertisement. It is readily apparent that it is not, and that it does not call attention to any article or line of goods. It is merely a lure to the public. But, suppose for argument we consider it as an advertisement. On appellee's own contention it would be an advertisement of a cash discount, which is contrary to the fact, because, as we have heretofore shown, the trading stamp is not a discount but a return of only a part of the added price.

Not all courts have failed to discern the fact. In the case of *District of Columbia vs. Kraft*, 35 App. D. C. 253, the court, in answering that argument, said:

> "In the case at bar the advertising feature is a mere pretense; it is of the stamp dealer rather than of the merchant."

That the public gather impressions from the advertisement of the trading stamp business contrary to fact, clearly appears in the case of *Sperry & Hutchinson Co. vs. Temple*, 137 Fed. 992, where Judge Putnam said:

> "Undoubtedly the way in which the business is done, requiring the stamps to be redeemed in articles of merchandise, mostly articles of furniture, leads to certain impressions on the part of the public which induce the parties to take trading stamps when otherwise they would not take them."

We need not cite authority to the effect that false advertisement can be prohibited.

A further fallacy in the argument of appellees may be noticed. They say that by the use of trading stamps they are able to give their customers a larger cash discount than they otherwise could do. The argument is unsound because the consumer does not receive a discount equal to the added cost to him, but it involves the absurd proposition that by in-

creasing his overhead expense for the purpose of giving a cash discount, he can thereby give a larger cash discount than he could without the added overhead expense, a proposition, we submit, not founded on reason.

One of the burning problems in American life today is the enormous increase of the cost of necessaries of life. Probably never before in the history of the United States has this problem assumed the proportion which it has during the last five years. It is a matter of common knowledge that a considerable portion of American citizens today are constantly engaged in the struggle for the means of mere existence, and that every increase in the price of the necessaries of life brings with it an added degree of actual hunger and want. This is not fancy. In the case of *District of Columbia vs. Kraft*, 35 App. D. C. 253, the court said:

> "The whole country is now agitated by the increased cost of living that has grown to alarming proportions, and legislative bodies are inquiring into its causes with a view, if possible, of providing remedies for the mischief. While there is a difference of opinion as regards the chief source, all concur in the opinion that every introduction of superfluous middlemen, and consequent unnecessary charges between producer and consumer, undoubtedly contribute to swell the stream to overflowing. Had the statute

under consideration been passed at the present session of Congress, it would be regarded as intended to promote the public welfare in this respect. Though enacted many years ago, when the mischief was not great, it answers the purpose of today.

"Now, what are the conditions presented by the facts in this case? An entirely unnecessary middleman, for his own profit solely, has injected himself between the regular merchant on the one hand and his customers on the other. He receives $3.50 for every thousand stamps issued to the customers, and redeems such as may be presented, in goods or in cash at $2 per thousand. By this means the corporation represented by the defendant in error has in the first year of its intervention received about $12,000, which should have either been retained by the merchant or received by his customers.

"Several other concerns being engaged in the same business, their profits are probably as great, if not greater. We have then this large sum of money annually taken from the merchant and his customers, and added to the gross cost of living of all of the people of the District, without return. Is it not for the public welfare, in the juridical sense of the term, to prohibit such an undertaking? We think that it is. Must this public welfare be sacrificed to the unlimited freedom of contract invoked in this case, to protect the right to prey upon local commerce? We think not."

These facts being beyond dispute, it is respectfully submitted that the police power as defined by this court is ample warrant for the legislature to prohibit a practice such as is defined in this case.

To concede the efficacy of the police power to support acts in aid of the general welfare and public prosperity, and in the same breath to deny the power of the legislature by that means so to deal with the problem of the trading stamp as to prohibit the burden of added cost of all necessaries of life, is hopelessly to beg the question. If the term "public prosperity" means anything, it must be given a practical application, and not merely a dry, scholastic construction; otherwise, we sacrifice fact to form.

Again, if the use of trading stamps be not inherently unsound, it must be conceded that it serves no useful purpose. Prof. Freund, in his work on *Police Power*, says (Sec. 293):

> "At the same time it must be admitted that the trading stamp business serves no useful purpose."

This court held, in the case of *Murphy vs. California*, 225 U. S. 623, that non-useful occupations might or might not be harmful to the public according to local conditions or the manner in which they were conducted. We may add that whether or not non-useful occupations are harmful to the public is a matter of legislative judgment, and that the only question for this court to determine is one of power.

In the case of *Dobbins vs. Los Angeles,* 195 U. S. 238, this court held that a business lawful today may in the future, because of changed conditions, etc., become a menace to the public welfare and be required to yield to the public good. This fact, taken in connection with the general condemnation of the use of trading stamps, should set at rest all doubt of the validity of the act in question.

Appellees argue that even if it be admitted that evils attend the use of trading stamps because of certain practices, their use in all cases should not thereby be condemned.

In the case of *Booth vs. Illinois,* 184 U. S. 425, this court answered a similar argument as follows (page 429):

> "Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter,

> they can say that the statute enacted professedly to protect the public morals has not real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by fundamental law." (Citing authorities.)

The following portion of the opinion is significant:

> "Perhaps the legislature thought that dealings in options to sell or buy at a future time, although not always or necessarily gambling, may have the effect to keep out of the market, while the options lasted, the property which is the subject of the options, and thus assist purchasers to establish, for a time, what are known as 'corners,' whereby the ordinary and regular sales or exchanges of such property based upon existing prices, may be interfered with and persons who have in fact no grain, and do not care to handle any, enabled to practically control prices."

The same argument evoked a similar answer in the case of *Otis & Gassman vs. Parker,* 187 U. S. 606, where this court said (page 609):

> "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law'."

Again, both Mr. Rubinow and Mr. Dosch in the articles above mentioned call attention to the fact

that the trading stamp has become a craze, particularly in the families of wage earners. This fact, in connection with the uselessness of the stamp and its tendency to extravagance and needless buying, is sufficient warrant for the legislature to prohibit the business. In the case of *Otis & Gassman vs. Parker,* 187 U. S. 606, this court upheld a provision of the California constitution avoiding all contracts for the sales of shares of the capital stock of any corporation on margin, and in so doing said:

> "We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion."

And, again:

> "If at that time (the time of the adoption of the constitution by the state) the provision of the constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil."

In the case at bar the act shows the conviction of the people of the State of Washington that the trading stamp is a menace to the public welfare

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and prosperity. And that opinion has been shared, as shown in our former brief in this case, by the legislatures of a majority of the states in the Union. This conviction, the facts show, is not an ill-considered impulse, but has been steadily held by the legislatures of a majority of the states of the Union for more than fifteen years. We respectfully submit that these facts are sufficient to warrant the act in question.

If the act be considered from the point of view of the merchant alone, without regard to the effect of the trading stamp on the public, ample reason appears to uphold the act. Retailers originally began giving trading stamps to draw trade. The merchant who gave stamps as well as merchandise got patronage from the merchant who did not. It was apparently a form of advertising, and if it cost him little enough to be safely within his cost of doing business, there was no criticism. But in time the stamp companies evolved a competition of their own, and rival stamp companies came into the field and sold stamps to the rivals of the first company's patrons. The more merchants took on stamps, the more their competitors were forced to follow, and as demand for stamps grew, so did the stamp companies to supply it. The result was that

stamps lost their value as a means of *drawing* trade and became absolutely necessary to hold even an *established* trade. Consequently, they have become a uniform charge on the cost of doing business which must be shifted to someone, without the benefits. It might naturally be said that in such a predicament a simple remedy would be to quit giving stamps, but the retailers find they cannot let go once they have taken hold. The public has become educated to the stamp idea, so that if one drops them he would suffer the competition of those who continued giving them. It might be suggested that an effective remedy would be concerted action of all merchants to discontinue the use of the stamps. Such action was taken by the merchants of Rochester, New York, and it resulted in an indictment for conspiracy, obtained by the trading stamp companies. It thus appears that one merchant cannot discontinue their use without ruin to his business, and that combined action is punished by a conspiracy indictment.

The appellees assert their right without any interference to sell packages of food products which have coupons or trading stamps inserted in them. Their argument is that of two pieces of merchandise substantially alike, if one carries with it a fractional equity in the prospective premium which

the other does not, it is the preferable one to buy. If such a conclusion also considered quality and service and a number of other features, it would be right, but human cupidity often sidetracks prudence in favor of the chance to get something for nothing. What starts as a logical judgment, ends in a wild race to get enough coupons to secure the coveted premium, and encourages wasteful and reckless buying to the end of getting the desired number of coupons. The argument also overlooks the effect of the lure of the coupon, and its deciding importance in making the purchase. The legislature may very well have believed that manufacturers, capitalizing this lure, have not maintained the quality of the goods, but have substituted inferior goods therefor, to their great advantage and the consequent loss to the public.

PREVAILING OPINION.

Replying to our argument that prevailing, preponderant opinion constantly held throughout a course of years as to the necessity of certain acts in aid of public welfare and prosperity, justifies the legislature enacting such opinion into law, and that the record facts as to such state of public opinion with reference to trading stamps justifies the act

in question, the appellees say that the action of the various legislatures in attempting the enactment of such legislation in the face of repeated decisions of the courts holding such or similar legislation unconstitutional, indicates not a sound public opinion, but a spirit of intermeddling on the part of the legislatures. We respectfully suggest that the courts setting up their opinions as to the necessity of such legislation, and of its effect upon the public welfare, might very well have observed the admonition of Mr. Justice Holmes in the case of *M. K. & T. Ry Co. vs. May*, 194 U. S. 267:

> "And it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."

Since writing our brief in this case, trading stamp legislation has been enacted by the following states at their 1915 session:

INDIANA: Chapter 184, Laws 1915, requiring a license fee of $1,000 for each store from which trading stamps are furnished.

NORTH CAROLINA: General revenue act. A tax of $200 on companies furnishing trading stamps to merchants, and $25 on merchants using the same.

COLORADO: An act prohibiting gift enterprises.

OREGON: An act levying a tax of five per cent. on the gross receipts of all merchants using trading stamps.

UTAH: Chapter 116, Laws 1915, requiring corporations selling trading stamps to merchants to be admitted to do business in the state, and to furnish a bond guaranteeing the performance of contracts to redeem stamps; and Chapter 117, imposing a tax of fifty cents per 1,000 stamps, or fraction thereof, sold to merchants.

SUMPTUARY LAWS.

Appellees invoke the unpopularity of the sumptuary laws as they once existed, and argue therefrom that the effect of this act is precisely the same as of such laws. We respectfully suggest that to prohibit a man from voluntarily spending more than a fixed sum for his personal adornment or living expenses is quite different from compelling everybody to pay not only for what they purchase but a portion of the price for some other article as well.

CLASSIFICATION.

To what we have already said on the point of the equal protection of the law, we merely desire to call the court's attention to the case of *Miller vs.*

Wilson, decided February 23, 1915, where this court said that if an act presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.

RETAIL MARKET PRICE.

Appellees contend that the insertion in the act of a retail market price clause renders the act too indefinite to make the prohibited act a crime, and invoke a familiar principle of law in that connection. They rely principally on *International Harvester Co. vs. Kentucky*, 234 U. S. 216, and *Collins vs. Kentucky*, 234 U. S. 634. A constitutional provision of Kentucky and three statutes of that state were involved in those cases. The act of May 20, 1890, made criminal all agreements to limit the amount of any article of merchandise to be purchased or sold, and all combinations by corporations with others to put the business of the combination under control with intent to limit, fix, or change the price of any article of commerce, or in any way to diminish the output of such article. The provision of the Constitution of 1891 (held not to repeal the above statute) imposed upon the legislature the duty of enacting all necessary laws to

prevent trusts from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value. The act of March 21, 1906, made it lawful for any number of persons to combine the crops of wheat, oats, hay, corn, or other farm products raised by them, for the purpose of obtaining a higher price than they could get when selling them separately, and provided for the appointment of an agent to handle the pool. By the act of March 13, 1908, the agent had the sole right to sell the pooled crop, and it was made unlawful for anyone to sell or buy such crop without the written consent of the agent.

To avoid questions of constitutionality, the Kentucky court held the foregoing provisions made lawful any combination for the purpose of controlling prices, unless for the purpose or with the effect of fixing a price that was greater or less than the real value, which term was "the market value under fair competition, and under normal market conditions." Such combinations would, of course, affect values. Of the problem to be solved in order to determine whether a crime had been committed, this court said (in the *International Harvester* case):

"Value is the effect in exchange of the

relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

The court's conclusion was as follows:

"But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

In the *Collins case*, Collins had pooled his crop and had disposed of the same without the consent of the agent. After calling attention to the above decision in the *Harvester case*, this court said:

> "With respect to each, the test of the legality of the combination was said to be whether it raised prices above the 'real value.' If it did—in Collins' case—he would be subject to penalties for remaining in the combination; if it did not, he would be punishable for not keeping his tobacco in the pool. He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these were organized to oppose."

No uncertainty whatever inheres in the term "retail market price." It does not require speculation into imaginary conditions. Despite all the protests of the appellees to the contrary, it is quite easy for them to ascertain what the market price actually is, unless their purpose is to violate the law and escape its penalty. If this court shall be of the opinion that the term so used is uncertain in the particulars mentioned, then we respectfully submit that the act, although otherwise valid, could

not be amended as to prevent its evasion by charging merely a nominal price for the various articles at the time they are given in exchange for trading stamps.

This court will recall its decision that the Sherman Anti-Trust Act prohibits only unreasonable restraint of trade, and although the act is criminal it is not indefinite.

Nash vs. United States, 229 U. S. 373.

In the case of *Waters-Pierce Oil Co. vs. Texas*, 212 U. S. 86, 108, this court upheld an anti-trust act of Texas which prohibited certain acts and also those which were "reasonably calculated" to fix and regulate the price of commodities, as against a similar attack.

In the case of *Joy vs. Washington*, decided February 23, 1915, this court upheld a statute making it a crime to edit printed matter which tends to encourage and advocate disrespect for law, although a similar attack was made on that act.

If appellees have any bona fide doubt as to the meaning of the term "retail market price," or of their ability to ascertain it, we suggest that they can very easily eliminate the same by complying with, and not attempting to evade, the act.

REMOVAL OF INSERTS.

Appellees contend that the act is unconstitutional because, they claim, it requires the removal of inserts in tobacco products before they can lawfully be sold. They invoke Section 3394 of the Revised Statutes of the United States as amended by Section 2 of the act of July 1, 1902, which is as follows:

> "No package of manufactured tobacco, snuff, cigars, or cigarettes, prescribed by law, shall be permitted to have packed in, or attached to, or connected with, them, nor affixed to, branded, stamped, marked, written, or printed upon them, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in, or dependent upon, the event of a lottery, nor any indecent or immoral picture, representation, print or words; and any violation of the provisions of this paragraph shall subject the offender to the penalties and punishments provided by section thirty-four hundred and fifty-six of the Revised Statutes."

by Section 10 of July 24, 1897, as further amended

We are unable to see how a prohibition of an obscene picture or print, or a lottery ticket in a package, works a prohibition of the state to pass the present act. If, however, it be contended that the act permits, as a matter of law, the insertion of everything not prohibited in the package, then it

would be equally true that Congress can prohibit or prevent the states from exercising police power. Appellees further say, "It is not contended that the state might not by appropriate legislation regulate or prohibit the sale of these tobacco products, etc." Their position then is that, although the state has the power of absolute suppression, it cannot exercise less than its full power. No reason appears why partial prohibition is invalid only for that reason, where concededly the power of absolute prohibition exists. Counsel cite, in support of their contention, *McDermott vs. Wisconsin,* 228 U. S. 115, and quotes from the same. The quotation is only a part of the language used, and, we respectfully submit, omits that portion of the opinion which shows the fallacy of the attempt to make that case fit the facts in the case at bar. This court said:

> "In other words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the federal law, *and for the determination of the correctness of which Congress has provided effectual means,* shall be removed from the packages before the first sale by the importer. In this connection it might be noted that, as a practical matter, at least, the first time the opportunity of inspection by the federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one state, and

> having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale." (Italics ours.)

It will thus be seen that this court squarely held that Congress had power to pass the Food and Drugs Act of June, 30, 1906, and that the label prescribed furnished the *means of enforcing the act,* a proposition not involved in the case at bar. Again, the court further said:

> "To require the removal or destruction before the goods are sold of the evidence which Congress has, by the food and drugs act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the federal law, is beyond the power of the state."

The Wisconsin statute which was held unconstitutional in that case required that such food products should not be exposed for sale or sold within the state unless they were first branded according to the Wisconsin act, which required the total destruction of the labels and brands prescribed by the United States. All this court held was that the United States, having the unquestioned power to pass the Food and Drug Act, had power to prescribe means by which its enforcement could be secured, and that no state had power to require the

destruction of the means of enforcement so provided.

Unless Congress permits the states to exercise the police power, they cannot subject any article which ever was in interstate commerce to taxation or regulation in aid of the police power. The rule laid down by this court is to the effect that so long as an article of interstate commerce remains in the *original package*, it can be sold irrespective of any state regulation, but that as soon as the original package is broken, and the contents thereof exposed for sale, it immediately becomes subject to the operation of state laws and loses its interstate commerce immunity.

The License Cases, 5 How. 504;

Bartemyer vs. Iowa, 18 Wall. 129;

Boston Beer Co. vs. Massachusetts, 97 U. S. 25;

Mugler vs. Kansas, 123 U. S. 623;

Kidd vs. Pearson, 123 U. S. 1;

Powell vs. Pennsylvania, 127 U. S. 678;

Brown vs. Maryland, 12 Wheat. 419;

Brown vs. Houston, 114 U. S. 622;

Schollenberger vs. Pennsylvania, 171 U. S. 1;

May vs. New Orleans, 178 U. S. 496;

Austin vs. Tennessee, 179 U. S. 343;

Leisy vs. Hardin, 135 U. S. 100;

Lyng vs. Michigan, 135 U. S. 161;

Rhodes vs. Iowa, 170 U. S. 412;

American Steel Co. vs. Speed, 192 U. S. 500, 520;

Cook vs. Marshall County, 196 U. S. 261;

Heyman vs. Southern R. Co., 203 U. S. 270;

Savage vs. Jones, 225 U. S. 501;

Purity Extract & Tonic Co. vs. Lynch, 226 U. S. 192, 200;

McDermott vs. Wisconsin, 228 U. S. 115, 135.

In the case of *Austin vs. Tennessee (supra)*, 179 U. S. 343, this court held that the term "original package" referred to the package in which the articles in question were ordinarily shipped in interstate commerce, and not in the small package in which cigarettes, for instance, were sold to the retailer.

So long, therefore, as there is no act of Congress, or lawful regulation of any department of the United States, that the packages containing tobacco and tobacco products *shall* contain coupons and trading stamps, the state may lawfully prohibit the sale of tobacco and tobacco products without any interference with paramount authority.

SEVERITY OF PENALTIES.

It is contended that the act is unconstitutional because of the penalty fixed for its violation, and *Ex Parte Young,* 209 U. S. 123, and kindred cases, are cited in support of the contention. The cases in which that rule was applied were, we believe, all rate cases. Of course, it is undisputed that the validity of an act fixing rates is dependent upon the return permitted by the rate so fixed. The question of profit on the investment, within the due process clause, is a civil question, of possibly the most intricate complexities, involving the nicest questions with which courts have ever been compelled to deal. Such acts compel in effect a correct determination by the carriers of the question of due return on the investment, or the prescribed punishment. In other words, if the carriers are honestly mistaken in their conclusions on this question, despite its complexities, they are nevertheless punishable by the terms of such acts. It clearly appears from the decision in the *Young* case that the rule of severity of penalties is to be applied only in a case involving, as a condition precedent to its application, the determination of such a civil question. If there is any doubt on that point, it is clearly set at rest in the case of *Wadley Southern Railway Co. vs. Georgia,* decided

by this court January 11, 1915, where, after citing the cases laying down the above rule, this court said:

> "These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the *validity of legislative rates or orders legislative in their nature*. Their legality is not apparent on the face of such orders, *but depends upon a showing of extrinsic facts*. A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

Furthermore, the portion of the act containing the penalty for its violation is separable from the remainder of the act.

We submit that the act is not subject to the objections urged.

Respectfully submitted,

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APPENDIX

APPENDIX "A."

"PREMIUMS IN RETAIL TRADE.

"Within the last year or two the 'premium craze', like a moral epidemic, has spread all over the country. Scarcely a middle-class or wage-worker's family may be found, at least east of the Mississippi, where some kind of coupons are not saved and some kind of a free prize not expected. While this passion of collecting coupons or certificates, whose actual value translated into United States money equivalents is often infinitesimally small, has been a legitimate and greatful object of humor and satire, the fact has generally been overlooked that the very magnitude of the movement has made the premium a phenomenon economically important and interesting, and deserving of a careful analysis. Being a feature of retail trade exclusively, the premium or prize once more reminds us of the significant changes in the organization of the retail trade which are taking place at the present time, and which have been studied but little by the economic scholar.

"The purpose of the premium is advertisement and publicity. Its aim is not only to gain, but to retain, the purchaser. It is therefore the essential feature of the premium that it be given for a series of purchases, and not for one. Yet exceptions from this rule are occasionally met with. Thus within certain districts of the New York East Side a very peculiar method of dealing in coffee and tea grew up some three years ago, which did not persist very long, but for the time being must have been a veritable Klondyke to the enterprising dealers. With every purchase of one pound of coffee a "free prize was given—some ware or household utensil, whose value was usually declared to be greater than the

total price paid for the pound of tea and the prize. The prices paid for the tea and coffee were naturally considerably higher than the prices for similar commodities anywhere in the country. In other words a peculiar phenomenon of a combined price for two articles absolutely unrelated to each other developed, and the purchase of cheap and often unnecessary goods simultaneously with the goods desired was the practical result of this peculiar economic aberration.

"Such cases are not exceptional, however. Wherever the technical aspects of the method employed in distribution of the prizes, the real aim is to preserve and to compensate the 'regular customer', to offer him an additional inducement over and above the terms granted to the occasional customer, and thus to guarantee the market. Economically, little can be said against this motive in principle. The large purchaser always commands better terms than the petty purchaser, and the permanent purchaser may be considered the larger purchaser.

"On the other hand, the premium is one of the many advertising schemes and methods of which such an enormous variety has sprung up within the last decade. A well-known soap-manufacturing firm in Buffalo, which was among the pioneers of the premium idea, openly acknowledges that the premium system was selected as a cheaper substitute for expensive advertising.

"Advertising is done either by the manufacturer or by the retail dealer. There can hardly be any question as to the fact that the real burden of advertising falls upon the consumer, while the greatest profit is derived by the advertising medium, the newspaper. A similar development may be noticed in the premium system.

"The various methods and systems of premium or prize-giving must be carefully classified. Thus we have, on the one hand, the manufacturer's premium. This is explained by the enormous development in the use of 'trade-mark' goods. In the olden days the retail dealer performed the important functions of selection of goods.[1] Then the manufacturer depended upon the retail dealer, and was obliged to offer him the most advantageous terms. This system can hardly be regarded a rational one, as the selection of goods is done by persons not interested in the intrinsic quality of goods. Formally at least, therefore, the development of trade in trade-mark goods must be considered as a change for the better. The consumer gets the particular product he knows and trusts. It is not a simple matter, however, for a new product to gain that confidence and popularity. Enormous outlays for newspaper and other forms of advertising must be made, if a new preparation is to be brought before the American public, and popularity can be kept up only by keeping up the advertising. The cost of this advertising often forms a heavy burden upon the price of the product. If some prepared cereal is retailed at fifteen cents a box, the largest part of the price undoubtedly represents the cost of advertising. The substituting of some other method for the wasteful system of advertising is therefore advantageous and desirable, both for the producer and the consumer.

"The premium system undoubtedly represents such an effort. How satisfactory it is, is another question, an answer to which will be attempted presently. The varied and interesting technical details of the system deserve short mention. The

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(1) "As was pointed out in a very interesting manner by Professor Edward Jones in the Annals of the American Academy, Jan., 1905.

most popular method is the inclosure of coupons, and the exchange of a specified number of coupons for a certain article supposedly useful or ornamental, whether a pair of gilt cuff-buttons for fifteen coupons, or a piano for forty thousand. Some tobacco factories use a part of the cigarette box for the same purpose. Again it may be the metal top of the tin box or the can of vegetables or preserved fruits. The inclosure of the "free" premium itself, as the cup, saucer, or plate, within the package, is certainly an original, but exceptional, method made use of by one firm manufacturing cereals. Here the phenomenon of a combined price for two commodities, entirely different, presents itself to baffle the most careful inquiry into the nature of value. This latter method comes dangerously near the gambling method of putting into different packages coupons with different letters, and allowing a premium only when a certain word has been spelled by means of these coupons. Putting a one-dollar bill into one of every hundred boxes, and letting the consumer take his chances, was a procedure that clearly came within the provisions of the criminal code, and was very wisely abolished.

"There exists still another plan which, in principle at least, widely differs from all those mentioned. This is the system of granting prizes in return for coupons plus some cash. The producer offers the consumer various goods for prices claimed to be much below the actual value of the goods. It is very questionable, however, whether these supposedly nominal prices are at all below the wholesale price paid by premium-granting firms. The premium here consists in the service of making a purchase for the coupon-holder, without charging him the commission, and in granting him the privilege of a wholesale price. Yet in its actual value this premium is probably worth more to the consumer

than the totally free premium consisting of some useless piece of tasteless china.

"That any and all of these schemes called forth violent objections from the competitors who had not adopted this method of advertising, was to be expected. Recently, however, the voice of the retail dealers in these goods has been heard in support of these protests. It is not evident, on the face of it, why the retail grocery-dealers should find the system of premiums objectionable, yet inquiries in that direction will bring out the interesting fact that premium goods yield a lower rate of profit to the retailer, and, more than that, that all popular trade-mark goods are poor profit-makers for the retailer, and the more popular they are, the less profitable is their handling in the store, for the more secure is the demand, the more stringent the condition of sale to the retailer. And what is true of trade-mark goods in general is still more true of the premium goods. The retailer is forced to contribute his share to the cost of the premium. The retailer fights against this tax, as well as against the general tendency of the manufacturer to reduce the retailer's importance (and incidentally profits) in the process of distribution.

"These considerations explain why the New York Merchants' Association, the National Association of Retail Grocers, and similar bodies have started such a bitter warfare against coupons and premiums. The leaders of these organizations point out, with a great deal of conviction, that the premiums are a parasite on retail trade; that they force the illusion upon the consumer of 'getting something for nothing,' while in reality he pays more than the premium is actually worth. The popularity of premiums is built upon a speculative basis, which can be but harmful in the everyday transaction of purchase of food supplies. The sys-

tem influences the public to buy larger quantities of supplies than are actually necessary, in return for which the home of the consumer is filled to overflowing with ugly and useless articles.

"A great deal of which is true, of course; yet this touching solicitude of the retail grocer about the consumer's pocket may call forth some suspicion as to its sincerity. The limited influence of these warnings upon the premium-mad public has been a matter of record. If the premium-giving concerns have yielded to a material force, and not moral persuasion, it was not done without some opposition. In this connection, the extensive correspondence between the National Association of Retail Grocers and a large cereal-manufacturing concern is interesting. In reply to a request from the Grocers' Association to discontinue the premium system, the manufacturers said:

> "'This is a premium age.
>
> "'It is estimated that three hundred different articles handled by the grocery trade have some form of premium to the retailer or consumer attached to them.
>
> "'With the increased cost of raw materials of every kind, there is less profit in the manufacture of cereal goods today than in the past. The cost of the ordinary methods of advertising in newspapers, magazines, bill-boards, etc., has increased enormously in the past few years; consequently manufacturers of cereals, in seeking to market their goods, naturally turn to premiums as being the least expensive and most effective method of creating a trade for their products.
>
> "'We were from the first opposed to premiums of any kind in connection with the sale of our goods. It was only after we became convinced that we were in serious danger of losing the leading position that we have always occupied in the cereal trade that we, much against our wishes, decided that it was abso-

lutely necessary for us to offer premiums or inducements to retailers and consumers on similar lines to those already being offered by our competitors.'

"After quoting from circulars of other cereal firms, to show how widespread the system of premiums is, the letter concludes:

"'We could quote you numerous other instances, similar to the above, showing that this means of pushing the sale of goods has been adopted by cereal manufacturers and wholesale grocers generally, as well as manufacturers of other lines of goods.

"'We are satisfied that the above facts will convince you we are not the originators of the premium plan, but that we reluctantly adopted it for self-protection. Under these circumstances we do not see how we singly and alone can abandon the plan. With a view of meeting your ideas as nearly as possible, and at the same time protecting our business from the inroads of our competitors, we make the following proposition:

"'We will agree to stop the use of premiums of any kind, sort, or description to jobbers, retailers, clerks, or consumers, in connection with the sale of our goods on a date to be fixed in the future (this includes all checks, coupons, certificates, bonds, missing-letter schemes, and printed offers of any nature, labels), provided all of the manufacturers, distributors and wholesale dealers in cereal goods in the United States do likewise.'

"As a result of the agitation and negotiation, some understanding was arrived at, and the most objectionable features of the premium system were abolished. Yet the letter makes clear that, as an important method of competition, the system in its entirety has come to stay, and will vanish only with competition itself. And competition, according to the firm conviction of "the man in the street" must be advantageous to the public. And, of course, it is. Witness the cracked china and gaudy statuettes in the homes of the public.

"The evident uselessness and ugliness of most premiums have not failed to become evident to many. It was felt that an attractive and useful premium might prove a much better drawing-card. And so, notwithstanding all the criticism, a new concern was formed very recently, with magnificent offices in one of the representative skyscrapers of lower Broadway, which has particularly aroused the ire of the retail grocers. The prospectus of this concern says:

> "'The growth of the premium plan has steadily developed, so that today scarcely a single one of the "necessaries of life" is sold without carrying, either through its wrapper, trade-mark, label, box-front, or other token, some sort of premium value. The great objection thus far to any of these individual premium plans is that the average consumer does not purchase enough of any one commodity to entitle her to a premium of any considerable value. As a consequence the public has been deluged with cheap and trashy premiums.
>
> "A new premium plan has been devised by the leading manufacturers of the United States whereby the purchaser of soap, cereals, condensed milk, canned goods, tea, coffee, cocoa, soups, extracts, baked beans, figs, shoe polish, catsup, salad dressing, olive oil, smoking tobacco, cigars, cigarettes, and over three hundred different brands of consumable commodities, may secure, instead of the inferior clap-trap premiums, handsome and substantial premiums through the combined efforts of all the prominent manufacturers. To make clear the difference between the individual and the associated plans, we will assume that Mrs. A. has purchased and saved the labels from one hundred tins of condensed milk, fifty cakes of soap, forty pounds of coffee, ten jars of extract of beef, etc. Mr. A. has also saved the tags from a six months' supply of tobacco or coupons from his cigars or cigarettes. The very best that this lady could secure from the milk manufacturer would be a cheap chromo, from the soap-maker a gilt hat pin, and from the coffee-packer a set of doilies, etc. Her husband also learns that, after smoking himself nearly to death, he has earned a pipe or a pair of cheap cuff buttons.

> "'The plan of this association, embracing the prominent manufacturers of the country, with an aggregate capital exceeding $20,000,000, is to enable the purchaser to pool his or her premium coupons and possess something that will fill a long-felt want in the home.
>
> "'If the grocer does not keep all the goods enumerated in this catalogue, he can, and undoubtedly will, get them for you, as each one is a standard, well-known product. By purchasing the brands of the manufacturers identified with this magnificent premium plan, and exchanging the wrappers, trademarks, labels, etc. (according to directions), you are enabled through this plan of household economy to furnish your entire home absolutely free.'

"This scheme, explained with such literary talent in this circular, deserves special attention, because it represents a transition stage from the manufacturer's premium to the dealer's premium, being not only a premium for buying a certain goods, but indirectly at least, a premium for buying at a certain place. The effect this scheme would be to concentrate the purchases at stores supplied only with goods of firms subscribing to this scheme. Presumably no two competing firms would join this 'union,' as the effect of premiums as weapons of competition would be destroyed by the coupons of both being given an equal value.

"If the interests of the manufacturers are at least partially taken into consideration in the last scheme, they vanish altogether in the system of retail-store premiums, which are based upon entirely different economic principles. The manufacturer of 'Strength, the Health Food', or 'The Turkish Beauties, the Best Cigarette', wants you to eat only 'Strength' or to smoke only the 'Beauties'. But disregarding for the moment the various rates of profit derived from various goods, it is immaterial to the retail trader what you consume, provided you

buy it of him; and it is the dealer's effort to fix the place of purchase, rather than the kind of goods consumed. In either case the purpose is the establishment of a habit. The technical aspects of the dealer's premium were very simple in the beginning. Cards bearing the designation of the amount of purchase, either in print or by punching, or the neat checks turned out by the automatic cash registers, were to be saved by the consumer until a certain sum of purchases was reached, which granted the right of a premium. These dealers' premiums first grew up in the small groceries, then extended to various other retail stores. Here again the same economic principle of remunerating the permanent customer was evident. But in practice this remuneration took the form of cheap and useless articles, namely bric-a-brac, the very production of which in such enormous quantities is an enigma. The overcrowding of the American city, not too spacious as it is, with these ugly things can hardly be considered an advantage, except for the bric-a-brac manufacturers, for whose products an enormous demand must have developed suddenly. Yet occasionally a much more sensible form of premiums may be met with, as, for instance, the right for a considerable number of 'shines' with each pair of shoes. The writer knows of a shoe-store where a pair of shoes is given free with the purchase of ten pairs. Here the premium amounts to a cash reduction in price by 10 per cent,—but only to the permanent purchaser. An interesting development of these dealers' premiums has been the extension of the epidemic over the male sex, mainly through the efforts of a well known system of chain-stores dealing in tobacco products.

"This is an era of consolidation; also substitution. And so both forces have started to play in the domain of the premiums, and the result has

been the much discussed 'trading stamp'. This device was heralded as the greatest invention of the competitive principle. And perhaps it was that for some time. It is the more interesting, therefore, to observe how this method has brought the whole system of premiums *ad absurdum*, and, like many other methods of extreme competition, has destroyed its own usefulness to anybody, and, while causing great losses to many, was profitable to a very few middlemen.

"In principle, the trading-stamp approaches the plan of pooling manufacturers' premiums, which has been described above, and tries to get at the same results as the dealers' premiums. Saith the trading-stamp man. 'What a single firm cannot do must be accomplished by co-operative efforts of many firms. You sell tea, or perhaps tobacco. The anual purchases of the average family at your store cannot be very considerable, and you cannot, therefore offer any but the cheapest premiums. But if you enter into an agreement with the dealer in shoes, dry-goods, drugs, lamps, etc., etc.—i. e. with a whole circle of retail stores, where most of the purchases of the family are done—you can, all combined, offer a premium that will actually be worth while. You are in different lines of trade, and do not compete with each other; therefore you may co-operate. But, of course, the co-operation requires a special mechanism, which we will furnish for a small consideration.'

"Thus, alluringly, spoke the trading-stamp man. The stamp is the mechanism. The originator of this scheme sells the stamps to the storekeepers, who distribute the stamps to the purchasers free, and, when a certain number of stamps has accumulated, the trading-stamp concern gives a costly premium in return for the stamps. The unit for a stamp has been put tentatively at a ten-cent purchase, with a

premium of one thousand stamps, or a total purchase of one hundred dollars.

"The plan proved attractive to the retailers. In a large city, like New York, a considerable portion of the retail trade goes to the small shops in the neighborhood. The small local retail dealer counts only upon the local trade, and struggles only against the local competitor. Here an excellent method of competition was offered, and a number of subscribers to the new scheme grew rapidly. In entering into the contract, the trading-stamp firm usually agreed not to furnish these stamps to any other dealer within a certain district, and thus a number of dealers gained a considerable advantage over their competitors.

"The writer had the opportunity to observe the growth of the trading-stamp mania in New York from its very incipiency, and saw its phenomenal success as well as its final fiasco. In the beginning the advantage to the enterprising dealer was not a small one. But neither the dealer nor the trading-stamp schemer foresaw the results which were inevitable. Competition arose in the very method of competition. The trading-stamp idea could not be patented. The dealers who were left on the outside had to imitate as a matter of self-defense. Besides, the high profits of the trading-stamp man could not help attracting attention. If the green trading-stamps proved a howling success, why not red, blue, yellow, and violet ones? A number of paralleled systems sprung up. Under the influence of the demands of the stamp-mad public, no dealer could afford to go without premiums. As a final result, some *status quo* was established, and the retail dealers on the whole, found themselves with the same circle of purchasers, but with an additional expense for stamps forced upon them. The stamps lost their dynamic force—the acquisition of custom

—as they increased the total purchase but little, but became necessary for the retention even of the established trade.

"Yet this *status quo* was only approximate. In reality they have rather injured than helped the mass of retail dealers, judging from New York experiences at least. The purchasing power of the consumer only partly reaches the neighborhood store. A considerable (and growing) share goes to the gigantic central department store. To a certain extent the trading-stamp was intended to revert a certain portion of this share back to the neighborhood store. The trading-stamp scheme did not seem to become a big, respectable department store. But if the trading stamp was aimed at the department tsore, the latter was not too slow to perceive it. And when the department store decided to accept the challenge, it found itself in a position to strike the small stores with their own weapons. In the hands of the department store man, the trading-stamp became a very dangerous weapon. The stamps becoming an object of trade, it could very naturally be sold at a considerable reduced price to a purchaser of millions of these stamps. A department store with gross sales amounting to many millions a year was able to distribute tens of millions of stamps annually. This reduced price was in itself an advantage, but when the large department store was enabled to give two stamps for each ten-cent purchase, while the small store could give but one, the small dealers had their eyes opened and saw what dupes they were when they permitted themselves to be convinced to boom the stamp man's business, for in the end the trading-stamp helped some large department store and injured the small dealer. That the trading-stamp man derived the greatest benefits from the transaction was to be expected. That was the rent of enterprise, of course.

His profit was made by the difference in the price of one thousand stamps and the cost of the premium minus the cost of running and advertising his business, of course. What this difference is it is impossible to guess at the value of the premium. The writer of these lines was, for a time at least, a victim of this craze, and has quite a respectable piece of cut glass to show for it. The retail value of this premium seems to be about three or four dollars, and it was received for one book only (i. e., one thousand stamps, which means a total purchase of $100.00). Judging from this example, the trading-stamp man should have received about four or five dollars for these one thousand stamps, and the stamps would represent one-half cent on a ten-cent purchase or 5 per cent discount. And, as a matter of fact, whether true or not (and we think not,) that was the value which the public thought the stamps actually had. Yet if the lavishness with which these stamps have been distributed is taken into consideration, and that at least one department store doubled the number of stamps once or twice each week, it certainly must not be supposed that any system could or would introduce a 10 per cent discount on each and every purchase. The truth of the matter is that, in getting his valuable cut-glass premium very early in the history of the trading-stamp idea, the writer was 'let in on the ground floor', as it were, and that the actual value of the stamps was much lower, as is claimed by some —only one-tenth of a cent—in which case it represents a discount of one per cent only. The value of the premium was rapidly reduced. The enormous quantity of stamps lost or left unused by the impatient consumers was so much additional pure profit to the 'man with an idea'.

"In view of the economic effects of the trading-stamp movement, which costs the dealer much more

than they were worth to the consumer, and brought the former nothing but the cost, one is not surprised to find the commercial classes soon starting a warfare against this spirit, whom they could not get back into the bottle again.

"As the retail merchants were many, and the trading-stamp men few, no special difficulty was met in the effort to pass a law regulating trading-stamps and premiums. Chap. 657 of the Laws of 1904, New York, Sec. 1, provides that trading-stamps must have legibly printed upon their face their redeemable value in lawful money; Sec. 2 provides that the holder of a trading-stamp shall be entitled to receive therefor from the company issuing the same its redeemable value either in cash or merchandise at the option of the holder; Sec. 3 provides that the trading-stamp companies must redeem stamps if offered in lots of five cents worth; Sec. 4 provides for the enforcing the law; and Sec. 5 exempts certain coupons based upon a dual and not a tripartite contract (i. e., the old-style coupon both given and redeemed by the retail dealer himself).

"The purpose of the law must be commended. It aims at destroying the speculative element of the trading-stamps, at preventing deceptions, while preserving the wholesome element of discount off the price. If the value of the stamp be known, and especially if the stamp be made redeemable in United States money at the option of the holder, the trading-stamp idea, which is based upon the speculative tendency of the public, would be reduced to naught. The stamp would simply mean so much reduction off the price, and both the dealer and the purchaser would be in a position to know exactly how much reduction is given. After the value of the stamps in cold cash was established, no retail dealer would think of paying more than that

redemption price for it, and so the business of the trading-stamp man would vanish into air. All this *would* happen if Chap. 657 would have any legal force. But the law has been declared unconstitutional by Judge Nash, who declared 'that it is the settled law of the state that it is not within the power of the legislature to suppress or regulate the issuing or sale of trading-stamps'.

"Thus, the matter is settled, so far as the legal aspects of it are concerned. And the trading-stamp idea is still spreading, though it is rapidly approaching the moment of total discredit in the eyes of the public. If it has come to the point where an evening paper, sold for half of one cent to the street urchins, gives with each copy two trading-stamps (it matters not of what fancy color), then the value of a stamp cannot be too high. But in this or that form the system of premium giving remains and will remain, as long as the retail trade will present the same features of high rates of profit and cut throat competition. One cannot help thinking, with Judge Nash, that the trading-stamp is as legitimate a method of competition as many other less ingenious ones. And if the competitors are suffering under the burden of this method of competition, while advantages derived by the consumer are small, is this then not the inevitable result of most competitive methods? If the system of premiums and prizes has made the average American alive to the faulty organization of retail trade, which yields an enormous profit and yet often fails to furnish the small dealer with the means for even a moderate existence, the work of the premiums will not have been in vain. This knowledge may give the stimulus toward a better system of trade and distribution, where the advantages and profits of retail trade will remain in the hands of the consumers; not in the shape of quasi-free premiums and prizes, but in the

shape of perceptible reduction in the retail prices.

"I. M. RUBINOW.

"Washington, D. C."

THE FALLACY OF THE TRADING STAMP.

BY

ARNO DOSCH.

"EDITORIAL NOTE.—*A great many women gather trading stamps and other premium coupons under the delusion that they are getting something for nothing. This delusion has pushed the trading stamp business to enormous proportions. Last year one firm sent out five million catalogues. The annual expenditures of another trading stamp firm is estimated at three million dollars. Altogether, the yearly burden added to household expenditures by the collection of trading stamps and premium coupons is not far from one hundred million dollars. It is an added burden all right. Make no mistake about that. Somebody has to repay the enormous expenditures of the trading stamp manufacturers and give them a profit besides. The legislatures of thirty States have tried to restrict the trading stamp business. Now, thirty States would not rise up against a business which was about to give its citizens something for nothing. Such widespread opposition must be based on fact. The whole idea of getting something for nothing through trading stamps and coupons is a fallacy and is really costing households a great deal of money. That is the simple truth. It is explained in the following story.*

"As a practical mathematician Laura was hard to beat. Arithmetic was her specialty and fractions her pride. She worked weekly wonders with Henry's twenty-dollar pay-check, and, besides, she was con-

stantly creating and sweetening various sinking funds and hidden reserves. She did not have to deny herself anything she needed and she also got most of the things she wanted, but, now and then, she honed for some household luxury or adornment that she could not bear to pay for out of Henry's sweat-won money.

"One day, on a keen hunt for bargains, she went into a new store and the girl behind the counter handed her a bunch of trading stamps. They were the first she had ever seen and she scanned them curiously.

" 'What are these?' she asked.

" 'A gift from the store,' the girl replied; 'when you get enough you can go down to the premium parlor on Main Street and pick out a beautiful present for yourself. If you're not collecting them already, we'll start you. Here's a book. It holds a thousand stamps. We'll make you a present of ten as a beginning and you get one with each ten-cent purchase. Several merchants in town are handling these stamps now and, if you always buy from them, you'll be surprised how soon your book is filled.'

"The idea caught Laura's imagination and she went down to Main Street to see what the 'premium parlor' contained. She had in mind a comfortable rocking chair, a marble clock, and several 'objects of art' with which to satisfy her esthetic nature. To her surprise and delight she found them all there, as if the premium man had cunningly divined her repressed wishes—which, indeed, he had. In addition there was a small mission (style) book rack to be had for one book of trading stamps, a dining table for three books and chairs to match for four more.

"Why go further into the torture of Laura's soul? By the time she returned home she had advanced from simple fractions to compoung fractions, and she knew what fraction of her daily fraction of expense would be represented in trading stamps. As she glanced ahead down the weeks, she saw her plain rooms transformed into—premium parlors.

"She had also hunted out and made mental note of other stores that gave trading stamps and remembered with a pang of regret the coupons in packages from the grocer and the soap wrappers she had long cast aside. For she found, by consulting the book, that she could exchange these for stamps and her book would be the sooner filled. She already had fifty stamps, which, in her calculations, represented one-twentieth of a rocking chair. But she also could not hide from herself that, in her anxiety to see the little stickers in the book, she had spent more than she intended, more, in fact, than she would have spent in two or three days of ordinary shopping. Nor did she find that week that she could slip any odd silver pieces into her secret reserves. For this she excused herself with the resolution that she would try to make it up the next week, and let the trading stamp book languish.

"Vain promise! Already the pasting of stamps in the book had become a fascinating delight. Dazzled by the memory of the 'premium parlor,' she was off on the long race to get something for nothing. She's racing yet, and with her are some millions of her sisters out on the same hopeless race. She would have been at it sooner, but a trading stamp company had only then 'opened up' the town in which she lived. The verb is taken from the trading stamp people themselves. They 'open up' a town as if it were their oyster. By now they have

opened up pretty much every town and village in the United States.

"If Laura was long on arithmetic, the trading stamp people could go her one better. They advanced into compound fractions first and gave her lessons. And the lessons they have given her and her sisters are so carefully censored to meet their ideas that they have succeeded in convincing all collectors of trading stamps that in some mysterious way they are getting something extra—a tip, a compliment from the storekeeper they have honored with their trade. As evidence of their good faith Laura will point out premiums scattered here and there in her rooms. She regards them with a loving eye, because she had to wait a long time for each one; but, to the unprejudiced, they do not amount to much. She could have bought them for very little money, if she had not forgotten to keep her promise to her little reserves. Instead, she was lured on by the will o' the wisp of full books skipping on before her and she paid for them dearly.

Something for Nothing.

"Now let us see how long it took Laura to get those premiums and enter into a few other calculations besides. Out of the twenty-dollar pay-checks she had to meet certain expenses which cost experts list as 'fixed charges'. Rent, gas, coal, laundry and Henry's small pocket money came under this heading and made an inexorable demand on more than half the income. Food also went down in the same column, and, in this matter, she had cut the initial cost to a close margin. Beginning her married life by setting aside a dollar a day for food, she had figured it down to sixty-five cents. This amounted to $4.55 weekly and left her almost $5 with which to clothe herself and Henry, add to and replace household things, sweeten her small savings and lay aside

for a rainy day. Until she made the acquaintance of the trading stamp, she had always made both ends meet and succeeded in having something over.

"But economy can be a passion as well as a necessity. The idea of the trading stamp made her covetous. Her palm itched for the rebate it promised. She turned the leaves in her almost empty trading stamp book and read eagerly:

"'The housewife, the mother of the family, must deprive herself of many things she has set her heart upon. She must calculate so closely upon the spending of the money that there is none left with which to buy the many things a woman needs to brighten her home. If she collects trading stamps, she will be able to get what her heart most desires and it will cost her nothing.

"This seemed to fit Laura's case exactly; and, with the sweet words still running through her head, she counted the stamps which had been painfully slow in reaching the hundred mark. 'Almost the tenth of a rocking chair,' she mused.

"She found that she could spend an average of $6 a week in stores where trading stamps were given, and each dollar meant ten stamps in return. With each ten cents purchase she received one trading stamp worth from a tenth to a fifth of a cent in premium parlor merchandise, amounting to a rebate of from one to two cents on the dollar. But Laura did not figure it that way. It was not intended that she should. If she had considered it merely in cents, she would not have been much interested. But she visualized it in the form of ten stamps, and ten stamps helped out quite a bit toward one thousand, which, to her mind, appeared in the form of a comfortable rocking chair.

"One thing bothered Laura's mathematics. She

tried to reduce the collecting of trading stamps to an exact science, and it could not be done. Foreseeing this tendency in the minds of various Lauras, the trading stamp people had very carefully steered clear of anything like an exact valuation. In some of the trading stamp reading matter she found an explanation. Said the book: 'This is not a money consideration, but a substantial appreciation of, and return for, continued patronage. You receive an occasional gift for buying regularly from merchants who issue these stamps.'

"'After all, it is only that,' thought Laura. It can't be reduced to a money standard.'

"When she arrived at that thought, she reached the frame of mind that is making millions for those astute compound-fractionists, the trading stamp companies. She had ceased figuring in money and had taken to basing her calculations on the number of trading stamps she received. And in this Laura is not alone. The millions of women who are collecting trading stamps and coupons at some time pass from a money standard to a trading stamp standard. And as soon as their minds make that subtle shift they are lost.

"But we are not collecting trading stamps—you may be, but I am not—and we see no comfortable rocking chair at the end of the rainbow. We have not been hypnotized into figuring in trading stamps as if they were the coin of the realm. Perhaps our minds can't grasp compound fractions. At all events, simple fractions will do.

"Imperceptibly Laura's six dollars a week crept up to seven. She had nothing in particular to show for the difference, prices had not advanced, and she thought she was buying to as good advantage in stores giving trading stamps as before when

she bought more widely—wherever the best bargains offered. She only noticed the discrepancy when she balanced her neat little account books. The truth was, Laura was not quite honest with herself. We can point out to her where the extra dollar went. She fell into the habit of patronizing exclusively stores giving trading stamps and, when possible, bought only groceries which contained coupons. Sometimes there was a cent or two to be gained by purchasing at stores where no trading stamps were given, or buying goods that did not contain coupons, but she bridged the difference with trading stamps. The difficulty there lay in that the bridge fell short. Trading stamps having no definite value, she could not see whether they reached, but we can tell her that they did not. It does not need any lessons in compound fractions to see that.

Snaring the Collector.

"Here is an example of the way Laura's calculations were twisted without her knowing it. All collectors of trading stamps will immediately recognize this illustration. Doubtless they have snapped at the same bait. One morning a grocer advertised that he would give away fifty trading stamps with a pound of tea. The moment Laura read the announcement, she saw those fifty stamps neatly pasted into her stamp book, and the tea was as good as sold. Afterwards she gathered that the tea was fifty cents a pound, ten cents more than she usually paid, but her trading-stamp-twisted thoughts figured that she was really getting the fifty stamps for the difference of ten cents in price. And then, consider how much better the tea was! Yes, consider and see where you arrive.

"Those fifty stamps were worth, at premium parlor rates, about five cents. So, as far as that goes, she got five cents in trading stamps in return

for her ten cents in good money. And whether she really got better tea lay entirely in the honesty of her grocer. No one but a tea-taster can tell the difference between tea costing forty cents and fifty cents a pound.

"In other ways rigid economy was also losing its grip. When it was having a hard struggle with natural desire over some inexpensive trifle, the trading stamps rushed to the support of natural desire and it was worsted. So it went, one way or another, in driblets. It was only a few cents here and there, but a dollar a week is less than fifteen cents a day and that goes quickly once rigid economy has a rival in the field.

"Meanwhile the trading stamp book was faring pretty well. Seven dollars a week was certain to bring seventy stamps and sometimes double stamps were given. A crafty theater manager also conceived the idea of giving trading stamps with each ticket purchased, and these also rushed to the assistance of Laura's natural desire in that direction. She and Henry went twice, spending altogether four dollars, which represented forty stamps in Laura's book. The theater-going did them no harm and added considerably to Laura's book; to-wit, between four and eight cents.

$11.00 FOR $1.49.

"What with fifty-cent tea, theater tickets and constant purchasing at stores which give trading stamps, Laura was getting about ninety of the little stickers a week and the rocking chair was within her reach so quickly that, on the surface, it looked as if trading stamps were the greatest boon that had ever entered Laura's life. At the end of eleven weeks she completed her thousand and, in less than three months' time, the rocking chair was hers. In fact,

Laura's case was a walking advertisement for trading stamps. She infected every woman she knew with the craze.

"But we who cannot figure in compound fractions and think in plain money find that rocking chair very expensive. Even on the indefinite figures she was able to arrive at, she did not get the full value of her trading stamps, and these in themselves cost her much more than they were worth. She had come to the conclusion that a full book of trading stamps would secure for her about two dollers' worth of merchandise, and she considered her rocking chair as worth that amount. But, after she had turned in her book and claimed her chair, she discovered a window filled with similar chairs being sold across the street, as if with baleful purpose, at a dollar forty-nine. You see, there are no bargain days at premium parlors.

"The chair, then, was really worth a dollar forty-nine, and, following the calculations of the trading stamp vendors, the particular stamp book, filled with a thousand stamps, was worth a dollar forty-nine. There is no other way to arrive at its valuation. Laura's rebate from the storekeepers for patronizing them so devotedly for eleven weeks was, then, a dollar forty-nine. Now let's see where they got off. Not taking into account the theater-tickets, which were worth the price, even without the rebate, we have already shown that she had been spending an extra dollar a week with nothing to show for it. That extra dollar a week and the dollar forty-nine value of the rocking chair did not match in Laura's mind. One in no way suggested the other. But you and I, who are not collecting trading stamps, see just where they lie side by side. It would probably not be worth the argument to tell Laura the chair cost her almost six times as much as if she had not

gone to the trouble of collecting the trading stamps. But you, dear madam (to follow the premium man's lead in always addressing his arguments to women), maybe you can be convinced. Let us follow Laura's career further. Perhaps it touches at points with your own.

"After the chair she got the book rack—this time in thirteen weeks, and then she set her face valiantly toward the distant horizon where the dining table reposed. Three books was her object, and, with these in view, is it necessary to say that Laura quite lost hold on her nicety of calculation? Rigid economy knew her no more. She was out for the stamps. And she filled her book so quickly, on account of a suit of clothes for Henry on which she received trading stamps, that she felt she could afford a splurge. So she turned it in for an Indian head burnt on leather. We won't question her taste in art. Undoubtedly she got great satisfaction from the contemplation and decorative effect of that Indian head, but Henry could not help feeling that he would have met his taste in clothes more nearly if he had looked around a little more and had not been steered by Laura into a store just because it gave trading stamps. Henry did not buy clothes often enough to know how he fared as to cost and quality, so we shall also refrain from judgment, but we are at liberty on our earlier calculations to figure that Laura went her usual pace as to weekly expenditures, and that means the Indian head cost no less than eight dollars.

"At the end of the year Laura had the rocking chair, the book rack, the Indian head and a lien on half a table. But, by this time, her weekly expenditure had seven dollars permanently as a low figure and usually soared toward eight. The change had come about so gradually that Laura was not aware

of it, but it was the natural result of changing from a money to a trading stamp standard. By this time Laura figured as naturally in trading stamps as an Englishman in pounds. But when she sat down with account books and pencil at the end of the year to see where she stood she found she had spent on household things $60 more that year than during the previous year. But she had nothing tangible to show for it except a rocking chair, a book rack, an Indian head and half a table, worth in all four and a half full books of trading stamps—about $9.

The Stamp Argument.

"Let us cut the agony short. In the two following years she secured in addition as trading stamp to this point, I explained my deductions to a chairs to match, the marble clock and a passable rug. Altogether they quite furnished a room, and Laura became an apostle of trading stamps. The value of these, both on the basis of $2 a book and according to the prices in the open market, was about $30. But Laura's books showed each year that she was spending at least $60 more a year than before she had the trading stamp craze. In three years she had spent $180 more than her earlier calculations, and a problem in simple fractions shows that $30 is just one-sixth of that amount. In other words, on account of her excursions into compound fractions, the $30 worth of furnishings cost her $180, just six times as much as if she had not gone to such pains to collect the money a tenth of a cent at a time.

"When I had traced the fallacy in the trading stamp premiums the other half of the table, the four woman who is a careful housekeeper and does not collect trading stamps. 'But,' she objected, 'if it had not been for the trading stamps, she wouldn't have had those things at all.'

"Capital answer! And a woman's, too. Really there was nothing to say in reply. It broke like a light on the whole situation. For the first time I got an insight into the remarkable success of trading stamps. I had been trying to figure ordinary dollars and cents, but the trading stamp people have been a heap smarter. They have figured women's desires and found a much more fertile field for calculation.

"But don't think for a minute the trading stamp vendors will admit anything of the kind. They will meet you on any field of argument and leave you the choice of weapons. I joined with them on this point and they came out flat-footed and made the bold and sweeping assertion that stores which give trading stamps invariably undersell those which do not. To this I made a parliamentary denial and went out to prove my taunt.

"Now this was a point upon which much depended, and I made the investigation without bias. I found stores giving trading stamps low-priced, but I did not find that they undersold other stores of the same character handling the same grade of goods. For the most part they cut prices, but so did their rivals who did not give trading stamps. I even found stores giving trading stamps which were more expensive. Generally speaking, neighborhood by neighborhood, in city, town and village, prices were about the same. They were gaged by competition, and not by trading stamps. Where the trading stamp stores won out and the housewives lost lay in the fact that women who dealt consistently at trading stamp stores failed to take advantage of the savings the other stores offered. Note this carefully, for it was Laura's case.

I brought this point up with E. B. Wright, secretary of the Sperry and Hutchinson Company, the million-dollar corporation, the founders of which

conceived the trading stamp idea some fifteen years ago. He disagreed with me.

"'No, that can't be,' he insisted: 'the live wires all giving trading stamps. You see, they're bound to cut prices because they *are* live wires.'

"'Exactly,' I replied. 'You answer your own argument.'

"But he could not see it, and he is a compound-fractionist, too.

"But there were others who took me up on a point even closer to the argument.

"'You assume,' said one of them, 'that all women are led into extravagance. Imagine a case when this is not true.'

"'In that event, she would appear actually to get her rebate of one or two per cent. By carefully gathering the stamps she eventually gets her premium. But has she actually obtained her rebate?'

"The answer involves a fallacy so subtle that it has really never been brought to light. Its existence has been suspected and even indicated. But its shadow has only frightened and its substance has remained in the background. At sight of the trading stamp states have instinctively jumped to their own defense. Laws have been passed or bills drawn up against it in thirty states. Now thirty States would not rise up against a business which was about to confer a great boon upon their citizens. So universal a feeling must have some foundation in fact. The trading stamp companies lay the objections to the local merchants, but as they also claim and have proved that they can make money for merchants, the objections could hardly have been all from that source.

The Effort to Curb the Business.

"At all events, thirty legislatures have recognized in the trading stamp an unhealthy growth, but the point has been too fine for the law to grasp. Acts have been framed against trading stamps as lotteries, but they have easily proved they are not that. They have been attacked because they have no fixed value and introduce a gambling element, and a nominal value has been promptly placed upon them. They have even been charged with restraint of trade, but this objection has found no standing in court. On all these points they have shown themselves to be impregnable time and again, and the legislature of New York is the only one which has shown any originality in its attack. It passed a law insisting that trading stamps be redeemable in *money* or goods at the option of the holder. When this was passed, it was freely predicted that the trading stamp faced a poser, but it won out on two counts. The courts declared the law unconstitutional because it created a 'preferential class' and because it interfered with the personal liberty clause in the Fourteenth Amendment to the Constitution of the United States.

"That personal liberty clause has saved the bacon for the trading stamp companies when everything else has failed. When called into the breach it has won all but one engagement. That one was before the Court of Appeals for the District of Columbia fourteen years ago and to this day trading stamps cannot be sold in the city of Washington.

"The legislators have lost, but their point remains good. They have been able to pass laws against gambling as a public menace and make it stick, because the general sentiment is against gambling. But when they tried to shield people from the trading stamps that have been temptingly shoved

across the counter, they have not had the same sentiment behind them. People have wanted trading stamps. What can a mere legislature do when even church congregations have turned their full stamp books into trading stamp companies and received new organs in return? They have not been able to get any support on the ground of immorality and, as soon as they have lost that basis of assault, the personal liberty clause has proved a sufficient bulwark.

"In one of its pamphlets addressed to retailers, the Sperry and Hutchinson Company has shown where its strength lies. 'The actual magnet which makes it (the trading stamp) a business success,' reads the pamphlet, 'is that throbbing human desire, dominant and unquenchable in every one of us, of acquiring something that the purse denies.' Or, more throbbing and unquenchable yet, the desire to get something for nothing. The premium dealers themselves openly avow we are all out to do them, but they know, just as well as the owner of a gambling house, that we are not going to be able to do it. In fact, they are shrewd enough quickly to insist that it is not a case of something for nothing. Of course it is not. The same pamphlet, in another part, reads, 'Without analyzing the business principle, the buyer may look upon it (the premium) as something for nothing.' In fact, he, or rather she, always does. But, you note, Sperry and Hutchinson make no such assertion. Along with all other premium dealers, they hasten to assert it is nothing of the kind. They refer to it as 'a reward for patronage.' That leaves no room for cavil.

"Nevertheless, the legislators have been right. They have realized that there is a fallacy in trading stamps. They have merely failed to make them illegal. They might as well have tried to pass a law to make it illegal for a man to act the fool.

As long as the trading stamp companies are able to convince several million women that they are getting something for nothing, or, as they put it, reward for patronage, they are safe. But this leaves the legislator just where he stood before. He has been peering down a dim thought-lane, along which we shall now cast our dark-lantern.

"In business, every transaction adds something to the final cost paid by the consumer. Some transactions are necessary; others not. Ordinarily there must be at least the producer, the manufacturer, the jobber and the retailer. If two or more of these can be combined the consumer is usually the gainer. If any are added, the consumer must pay their margin of profit. Money-makers are constantly trying to wedge in somewhere to get a slice of profit, and competition is constantly forcing the number of transactions down to the minimum. The friction keeps business conditions healthy. But, suppose a new middleman comes along who cannot be thrown off by competition. Suppose he wedges himself in between the retailer and the consumer and has convinced the consumer he is a friend, how is he to be thrown off? Suppose he wedges in on all classes of business. That is what the trading stamp companies have done. They say they reduce the price of goods, but how can they, when their margin of profit must also be paid? And that margin has been considerable. Sperry and Hutchinson alone have made millions. They have in their employ three thousand people, most of them well paid. Their salaries must also be met by the consumer. Argue any way you like, you can't get past the fact of this additional load of expense.

"But, of all the courts before which the trading stamp question has been threshed out, the one in Washington alone saw through the maze of argument to this inevitable conclusion. Scorning all legal sophistry, it dived straight to the bottom of the matter. Its decision reads:

"'There is not a show of rational foundation for the trading stamp company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued, and its contracts faithfully performed, its inevitable result would be, as in all unnecessary interventions of third persons, or "middle men," between producer and consumer, an increase of cost to the latter.'

"This paragraph was the conclusive argument in the one successful attempt to prevent the issuing of trading stamps. Here alone the fallacy was followed down until there was no ground left for it to stand upon. It was based on the broad, simple and incontrovertible principle that an additional middleman is a fixed burden who must be carried by the consumer—you and I, Laura, all of us.

"But, the trading stamp men reply, the giving of trading stamps is an inducement to buy and must be classed as advertising. At first glance this argument sounds reasonable, but remember that this is a region of fallacious argument. Analyze this one and you find there is a wide difference between an inducement to buy and an advertisement. Trading stamps constitute an inducement to buy, but they are not an advertisement. They induce purchasers to buy at a certain store, but advertise none of the articles it contains. They act as a lure, not an advertisement.

"The trading stamp companies have shown the

fallacy in their own argument. In pushing their business as far as possible they have pushed themselves, logically speaking, in to a corner. In the city of Buffalo they have been so successful that there is only one large store now which does not give trading stamps. And, where practically all give trading stamps, wherein lies the value of the advertisement?

"Meanwhile the people of Buffalo must pay all expenses and a profit to the trading stamp middleman. It must come out of their pockets. The final consumer always pays. And an unnecessary, cumbersome transaction must take place before all the goods due them are delivered. They must go to infinite pains collecting trading stamps and turning them in for premiums to get what is coming to them. The proposition there is reduced to an absurdity, and at the rate at which the business is spreading, it will soon be reduced to the same absurdity everywhere. When the goal of the premium man is reached, and it looks as if it were not far off, every store will issue trading stamps, every package will contain a coupon, and for any one of us to get his money's worth, it will be necessary to collect and assort these and turn them in for premiums. Then we shall see what a cumbersome business we have imposed upon ourselves in 'our throbbing human desire' to get something for nothing.

"As far as certain kinds of goods are concerned this is true already. It is the case with soap. The giving of soap premiums has become almost universal, and what was at first something resembling an advertisement has become a fixed charge on most varieties of soap. Soap wrappers and coupons are now all interchangeable for trading stamps and can be redeemed at trading stamp parlors. So the necessity of using one soap constantly in order to get a premium is past. All soap wrappers look alike in

the premium parlors. With soap, then, the premium game has been carried to a point where there is no longer any point in it.

"Sooner or later, the same thing is bound to be true of all goods. When that time comes, will the whole game be called off by common consent, or will that whole fungus growth of a burden continue to be forced upon the ultimate consumer? How great that burden is right now can be judged from the fact that the premium department of the American Tobacco Company alone is said to have required an appropriation last year of $800,000. The head of one premium house told me he had sent out last year over 5,000,000 catalogues. The annual expenditure of Sperry and Hutchinson is given unofficially at $3,000,000. The whole burden put together adds up to far more than $100,000,000. And to get our share of what is not consumed in running expenses and profits we must endlessly add sticker after sticker worth a tenth of a cent apiece.

The Only Help.

"Stores giving trading stamps are quite open in declaring that the only way to get your money's worth is by collecting trading stamps, and there is also no question but that merchants find that it pays to give them. I will have to yield the premium men this unwilling advertisement. Stores have been forced into giving stamps that apparently have no real liking for it, but they feel they must be in the swim. That is where the trouble lies. The people demand them. In the wild chase to get something for nothing, they know not what doom they are bringing down upon their own heads, but stumble on fascinated by the will o' the wisp.

"A store on the East Side in New York recently made an unusual premium offer and the sidewalk was blocked before the opening hour. All day the

crowd became thicker and finally the women were jammed in so tight that they could not be waited on and it was necessary to call the police reserves to clear the store.

"An even more enlightening scene was enacted the first time 'double stamps' were ever offered. The man who conceived the idea was the son of the proprietor of a New York department store. When he confided the scheme to his father, the older man declared it extravagant, but gave his permission to try it on a line of women's suits that was going badly. It cleaned out the whole of that undesirable line at a big profit and the store has been devoted to 'double stamps' ever since. But what about the women who got the suits? Got what they deserved, you say? Yes, but millions of women are doing the same thing to a greater or less degree every day in all parts of the country.

"What is to be done about it? The legislatures have certainly done their best, and there is no help to be hoped for from the courts. The Appellate Division of the Supreme Court of New York has cleared up that point. It said:

"'It may be that the trading stamp business tends to demoralize trade. It may be that people in moderate or straitened circumstances are prone to purchase beyond their means by the incitement of a gift after a stated amount has been expended. * * * These slight derelictions may be imprudent, but they are not the subject of legislative control.'

"This is true even though, as the courts in Massachusetts held, the trading stamp companies 'induce people to buy what they do not want by the promise of a gift or prize, the precise nature of which is not known at the moment of purchase.' And the case is not as bad as that. Collectors of

trading stamps usually know what they want, and, as the managers of premium parlors have learned to their sorrow when some particular premium has been out of stock, they want what they want when they want it.

"The only help that can come is from the people at large. If they will let the fallacy in the trading stamp sink home, the business will languish and finally die out. Unfortunately, the only truth about the trading stamp which is being fostered at the present time is that you are not getting your money's worth unless you collect them. This is undoubtedly true, but, if you do collect them, your loss is greater yet. It was six times greater in Laura's case. Better throw away your coupons and trading stamps. It may take a wrench, but you will save money by it."

CHAPTER XIII.

"Premium Giving"—Store Management Complete.

By Frank Farrington.

"Premium giving to get or to hold trade is so common nowadays as to be almost universal. If it could be entirely eliminated from business, from the giving of a cigar to the man who buys freely or who settles his bill, right through all grades up to the buying of the patronage of the richest family in town or by giving their purchasing agent a rake-off, the mercantile world would be saved a tremendous amount of money to be added directly to its net profits.

"However, there is no possibility of disposing of premium giving to any such extent. There will always be the opportunity for merchants to secure

favor and custom by giving something more for the money than the mere goods bought.

"This means that the man who uses such means in the most attractive way will reap the richest results. It is not the merchant who gives the largest money value with goods who will draw the most trade by the means. It is he who offers his premiums in the way that will interest and appeal to the most people. There is a psychological element in the matter.

"For instance, you may offer your customers checks with all cash purchases, amounting to a five per cent. discount when returned in lots of ten dollars or more. Your neighbor may offer for the same kind of checks premiums that cost him less than five per cent. of their value in checks, and yet the man who carries the line of premium goods will get his checks saved by pretty nearly all his regular customers, while only a very small per cent. will save checks for the promised five per cent. in money.

"If men were the buyers and shoppers, the result might, I say *might*, be in favor of the cash rebate, but women do most of the buying and women are attracted much more by a display of alluring gifts, premium goods, than by the promise of money at an indefinite day. *Besides, the premium goods can be listed at a value quite a bit higher than their actual cost, which will make them appear all the better as an attraction.* (Italics ours.)

"Does it pay to give premiums?

"Without a doubt it does pay when judiciously done. No advertising or business-getting effort pays unless it is conducted wisely. There are undoubtedly many individual instances where it would not pay to use premiums. These, however, merely serve to prove the rule. Judicious premium giving pays.

"It pays to give the farmer who drives in on Saturday and buys a big bill of goods from you a cigar and something to take home to the children.

"It pays to give Mr. Moneybag's butler his little five per cent. rebate on his master's supplies. It pays to make it an object for the purchaser of small lots to buy *all* of those small lots from you instead of scattering them here and there all over town.

"In some cases it pays to do these things because if you did not do them they would be done by the other fellow and he would get the business. In other words, premium giving is sometimes necessary only as a means of self-defense, though in cases it has no other excuse, if both you and the other fellow, your competitor, were to omit the practice, you would both save money—to spend it in trying by some other methods to get ahead of each other. Two live, active, competing merchants are certain to develop more or less costly methods of business getting and perhaps it might as well be premium giving that uses up their surplus as foolish forms of advertising.

"When a number of competing stores form an agreement to abolish some certain practice which they feel has come to be a burden, part of those stores will benefit by the change.

"Just as in abolishing the giving of premiums by a certain line of stores the stores with little capital and a lack of ability to carry a good line of premiums would be placed on a par with the store with all kinds of money to handle the premium business properly.

"Nearly all the rules that apply to the so-called legitimate forms of advertising apply to premium giving.

"The expense of premiums should be charged to the advertising account and its total should be kept well within the proper limitations. Unless premiums are necessary in order to meet the premium giving of other stores and thus enable one to hold trade, they must be made to produce new business.

"Premium giving which does not produce business, like advertising that does not produce business, is a useless expense. If a merchant is simply giving customers so much bonus for trade that they would give him anyway, he is throwing away his premium money.

"No store can live long unless it develops new customers. The old customers will, some of them, move out of town, some will die, some will be inveigled away by other stores. Unless your store gets new customers, it will soon be lost in the shuffle.

"In order to make premiums produce new customers the fact that you are giving them must be exploited continually among people who are not your customers, among newcomers in town, among people in adjacent districts who ought to be trading in your town, but who are habitually going elsewhere. This can be done best by the use of circular letters.

"And in this connection it is well for any group of merchants, any merchants' association representing a town, to consider before adopting a resolution abolishing the use of trading stamps or coupon or premium schemes among its members. There may be a nearby town that will take advantage of such a condition and lure away much of the business that it has not been getting under previous conditions.

"And any agreement among merchants to

abolish premiums should be made to include *all* merchants in town. Otherwise some little fellow who has limited capital but unlimited ability and ambition may take advantage of his exemption from any such agreement and begin to grow at an unexpected pace.

"The use or non-use of premiums then would seem to call for individual decision in the case of every individual merchant. No hard and fast rule can be laid down for all cases.

"I would, however, strongly advise any merchant to consider well both sides and all phases of the question before going into it. It may be just what he needs to remedy faulty conditions and to bolster up a failing business. It may be that it would prove of no advantage to anyone but his customers.

"But if a merchant is to use premiums he should see that he uses them in the way that will produce the least work, the least expense, and the greatest returns.

"Probably the plan that will produce the least work is to take up one of the numerous forms of trading stamps put out by concerns in the premium business and simply hand out the stamps with purchases as agreed. This, however, involves the paying to trading stamp people a profit on their goods and their business. The cost of these stamps is paid by the merchant. He cannot raise prices any to cover that cost. The cost of the stamps includes the cost of the premiums, a profit on them to the trading stamp company and also all the expenses of that company for handling its business.

"And right here I want to remind the merchant using trading stamps that it is a poor plan to begin offering 'double trading stamps' on certain days or in any other way to precipitate a trading stamp

war, which is, in fact, nothing more than a competition to see who will cut a price the farthest.

"The merchant who handles his own premium proposition in its entirety is certain to save money on its cost when done by the trading stamp plan. Of course, he is not co-operating with other merchants and enabling people to combine the stamps received from him with those from other sources, but he is doing all his work for his own store. These same other merchants having your kind of stamps, though presumably in other lines of trade, do lap over into your line in innumerable cases.

"You can give people enough better value for the money if you buy your own premium goods so that they will save your coupons, even though they cannot combine them with others.

"The kind of coupons to use varies in different stores. The plan that is probably simplest and easiest is the use of checks issued by a check printing cash register.

"The checks bear the amount of the purchase, the initial of the clerk making the sale, the date of the sale and printed matter which may tell how the checks are to be used to secure premiums.

"In a store which does not use the cash register system, numbered and priced coupons may be used, following any plan that the manager thinks best to adopt. In a store where the sales are mainly five, ten and twenty-five cents or multiples thereof, checks or coupons of those amounts can be used exclusively.

"In using these premium checks they should never be given with any but spot cash purchases, meaning purchases where the money is paid when the goods are taken away, not the next day, or even

in the evening of the same day, but at the very time the goods are taken.

"Any sale that has to be charged even for a few hours should draw no premium check. And herein lies one of the greatest of values of the use of premiums. They make a credit business into a largely cash business if they are properly exploited.

"There will always be people who will want to come in and pay in a few minutes or hours or days and still get the coupon. There should be a rule that will absolutely prevent any such work. This rule ought to be printed on the coupons and placed in conspicuous places around the store and over the cash register or cashier's desk.

"There will be instances calling for considerable tact to keep the customer satisfied and yet avoid violating the above rule. People will telephone in for goods to be brought to the house and expect to come in later and pay and get the coupon. In such cases, the coupon should be sent with the goods and the messenger instructed to explain that if the coupon is desired he must be paid for the goods. He should be provided with proper authority and plenty of change, and if the customer tends payment and the messenger cannot accept it for any special reason, it may be that fairness and common sense dictate that the coupon should be given later when the amount is paid, unless obviously allowed to run unnecessarily long.

"Then there will be times when goods ordered for a customer will come before the bill comes. The customer may be in a great hurry for the goods and you do not know how much to charge for them. The customer is prepared to pay. It is pretty obvious that that customer is entitled, if the goods are paid for as soon as you give him opportunity to pay, to a coupon.

"Some stores install a premium-giving system and then act as if it hurt them to have to hand out a coupon. They never give them up except when the customer asks for them. Under such conditions the plan will fail. Customers may ask for the coupons once in a while, but not often enough to make the plan of any value. The checks should be handed out to every one who is entitled to them without fail. If the scheme is a good one it should be pushed to the limit with every customer. If it is a poor one it should be abandoned at once. There should be no half-way work and clerks and salespeople should be so instructed.

"A kind of clerks may be supercilious and inclined to act a bit scornful over the insistence of a poor customer whose purchase is small who is just as anxious to have her coupon as any purchaser of larger quantities. All buyers ought to be treated alike and all given the checks as a matter of right and not as a favor. If the check is forgotten, and then asked for, it should be given with an apology for the delay.

"It is not well to put a close time limit on the coupons. It discourages a customer to note that there are only a few weeks or even months in which to get enough coupons to win a premium. And as the end of the time draws near it will be difficult to interest new people in the plan.

"Leave the offer open indefinitely with the statement to everyone that there is no time limit and that when the offer is withdrawn there will be plenty of notice given in the newspaper advertisements, and further that all coupons will be redeemed anyway. Then when it does become desirable to end the time on coupons for the purpose of starting a new plan or for any reason, announce the same generally in advertising space and ask all customers

holding coupons to bring them in for settlement and after a few weeks of such notice announce a final date after which no more coupons will be redeemed.

"It pays to be generous in such a matter, because generosity will hold the customer's trade and the reverse will lose it. A customer badly treated on one coupon deal will never try the scheme again, no matter how attractive it may be made.

"It seems absurd on the face of it and yet there are many stores in which premium plans are followed and handled in such a way that they make enemies instead of friends for the store. In the transaction of all business between the store and its customers tact must be used and care to avoid friction. The premium business increases the proportion of business transactions between merchant and public and thus increases the chances for difference.

"It is often a question with the merchant who provides his own premium system to know what to use for premiums.

"The variety of the premiums should be sufficient in kind to provide for different tastes and for repetition by the same people without having to take the same premium over and over again. It should offer premiums at sufficient different prices or amounts so that all grades of customers may find something to work for.

"It generally proves wise to offer premiums graded at five, ten, fifteen and other multiples of five dollars up to fifty dollars, and in stores where the individual sales are often of considerable amounts, to much larger sums.

"Since most purchases are made by women, most of the premiums should be made to appeal to women and in any event, even in a cigar store, it is

best to make the premium list appeal to the feminine side of the household, for the men who will start and continue saving any kind of coupons on their own initiative are few.

"Articles of utility have not as much premium value as articles that are more or less of luxuries, useful luxuries perhaps they might be called. For instance, cut glass is a very good line. All women like to have that or similar decorative things in the house, and those who can afford to buy but few of them are apt to feel that the premium plan offers a chance for them to get for nothing something they have long wanted but could not spend the money for.

"Thus cut glass pieces, decorated chinaware, silverware and other table things make about the best and most desirable premiums for first choice. Teaspoons or other silverware can be carried in standard pattern and the customer allowed to take spoons, etc., one at a time, thus gradually accumulating a set. Jewelry makes especially good premiums.

"And then goods of these kinds commonly retail at a large profit so that the value of the premium can be listed well above its actual cost to the merchant.

"The customer calling and presenting coupons for a premium ought to be treated with the same courtesy as if she were making a purchase. It takes away all the benefit accruing from giving the premium if it is handed out as if the store were condescending to bestow a great favor.

"The customer with the coupons is entitled to the premium just as much as if she were buying it with money and she is entitled to the same courtesy in the transaction. She should be treated exactly as if she were making a real money purchase, being

waited on in turn and given abundant time to make a decision and allowed to exercise choice in choosing the gift.

"The premium goods should be shown with the same care, displayed with the same desire to attract attention to them that is used in displaying goods for sale. The more people there are attracted to examine and inquire about the goods, the more may be induced to begin saving for them, and once you get a woman saving checks from your store, no one can drag her into your competitor's store for anything you sell.

"If customers wish to buy the goods displayed as premiums, sell them to them at the rate the premiums are estimated worth, and it is wise to have an established ratio between the face value of the checks and the estimated value of the premiums.

"It may be that you can rate your premiums worth ten per cent. of the checks. In that case you have a fixed selling rate for the premium goods when anyone wants to buy, and you have a basis upon which a deal can be effected if a customer has almost checks enough and wants to pay the difference in cash. Suppose the customer has forty dollars in checks and wants a premium rated at fifty. If your premiums are on a ten per cent. basis, you allow the customer to turn in the forty dollars' worth of checks and pay one dollar in money and take the premium.

"Keep careful track of the expense of the premium plan and also keep track of the increase in business that may possibly be attributable to the use of premiums. Don't run the plan a bit longer than it pays. It is your business to know whether it pays or not. When it comes time to get out of it, do so as gracefully as you can, but do it. No better reason is necessary than the fact that you cannot afford to continue its operation."

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IN THE

Supreme Court

OF THE

United States

October Term, 1914

W. V. TANNER, as Attorney General of the State of Washington, GEORGE H. CRANDALL, as Prosecuting Attorney of Spokane County, State of Washington, and E. W. EVENSON, as County Treasurer of Spokane County, State of Washington,
Appellants,

v.

JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and WILLIAM T. OATHOUT, doing business as Ryan & Oathout, et al.,
Appellees.

No. 686 224

Appeal from the District Court of the United States for the Eastern District of Washington.

BRIEF OF APPELLEES

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LOWMAN & HANFORD CO., SEATTLE

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IN THE

Supreme Court

OF THE

United States

October Term, 1914

W. V. TANNER, as Attorney General of the State of Washington, **GEORGE H. CRANDALL**, as Prosecuting Attorney of Spokane County, State of Washington, and **E. W. EVENSON**, as County Treasurer of Spokane County, State of Washington, **Appellants,**	**No. 595**
v.	
JOHN T. LITTLE, AUGUST STAHLBERG, LAWRENCE RYAN and **WILLIAM T. OATHOUT**, doing business as Ryan & Oathout, et al., **Appellees.**	

Appeal from the District Court of the United States for the Eastern District of Washington.

BRIEF OF APPELLEES

The question presented to the Court by this appeal is the validity, in view of the Federal Constitution, of an act of the Legislative Assembly of the State of Washington passed March 20, 1913—in common parlance, "The Trading Stamp Act," which is as follows (Laws of 1913, p. 413):

"CHAPTER 134.

LICENSING TRADING STAMPS.

AN ACT relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares and merchandise, and providing a penalty for violation thereof.

Be it enacted by the Legislature of the State of Washington:

Section 1. Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge, or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

Sec. 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm,

or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

Sec. 3. No person, firm or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city or county in this state other than that in which such furnishing or selling shall take place.

Sec. 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor.

Passed the House March 4, 1913.

Passed the Senate March 12, 1913.

Approved by the Governor March 20, 1913."

In connection with this Act is to be read the following provision now in force in the State of Washington (Laws of 1907, p. 742):

"CHAPTER 253.

TRADING STAMPS.

AN ACT relating to premium stamps, commonly called trading stamps, cash discount stamps, ticket or rebate check, ticket, coupon or other similar device, and to provide a penalty for any violation of this act.

Be it enacted by the Legislature of the State of Washington:

Section 1. No person shall sell or issue any

stamps, trading stamp, cash discount stamp, check, ticket, coupon or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall have legibly printed or written upon the face thereof the redeemable value thereof in cents.

Sec. 2. Any person who shall sell or issue to any person engaged in any trade, business or profession, any stamp, trading stamp, cash discount stamp, check, ticket, coupon or other similar device which will entitle the holder thereof, on presentation thereof either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, shall, upon presentation, redeem the same either in goods, wares or merchandise, or in cash, good and lawful money of the United States, at the option of the holder thereof, and any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number, when presented, at the value in cents printed upon the face thereof, as hereinbefore provided.

Sec. 3. Any person engaged in any trade, business or profession who shall distribute, deliver or present to any person dealing with him, in consideration of any article or thing purchased, any stamp, trading stamp, cash discount stamp, check, ticket, coupon or other similar de-

vice, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the person issuing or selling the same, as set forth in section 2 thereof, or indirectly through any other person, shall, upon the refusal or failure of the said person issuing or selling same to redeem the same, as set forth in section 2 thereof, be liable to the holder thereof for the face value thereof, and shall upon presentation redeem the same, either in goods, wares or merchandise, or in cash, good and lawful money of the United States of America, at the option of the holder thereof, and in such case any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices, shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number when presented, at the value in cents printed upon the face thereof, as hereinbefore provided.

Sec. 4. Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and shall be fined not less than $100 nor more than $1,000 for each offense.

Passed the Senate March 4th, 1907.

Passed the House March 9th, 1907.

Approved by the Governor March 20th, 1907."

Also the following provisions relative to the duties of the Attorney General and the various prosecuting attorneys within the State of Washington (Remington & Ballinger's Annotated Codes & Statutes of Washington, Vol. 1):

"Sec. 112. The powers and duties of the attorney general, in relation to actions and proceedings in the courts, shall be * * to consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution."

"Sec. 116. The prosecuting attorney of each county shall have authority, and it shall be his duty, subject to the supervisory control and direction of the attorney general, to appear for and represent the state and the county of which he is prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county is a party."

The appellees here, who were plaintiffs below and to whom we shall refer throughout as plaintiffs, filed their amended bill in the District Court of the United States for the Eastern District of Washington, on behalf of themselves and others having a common or general interest, against the Attorney General of the State and the Prosecuting Attorney and Treasurer of Spokane County, a county within the District. It is, in effect, alleged:

1. The plaintiffs, citizens of the District, are engaged in the City of Spokane in retail business of various character—such as hardware, grocery and drug business, having invested in their business different amounts ranging from $2500 to $15,000; and as to each of said plaintiffs the gross income from his business will not exceed $6,000 annually, and as to many of them less than half that amount.

2. Each of the plaintiffs had used various systems of advertising, such as circulars, billboards, newspapers and electric signs, and had also used and is using the premium advertising system, so-called, for the purpose of increasing the volume of his business, and especially his cash trade, in the manner following: With the use of goods and merchandise, the complaining merchant gives to his cash customer stamps, tickets or coupons at the rate of one stamp for each cash purchase of convenient unit amount, which coupon entitles the customer to a certain cash discount, or, free of charge, to certain articles of merchandise of the customer's selection when presented in certain prescribed numbers for redemption as to such merchant as redeems his own coupons, or to a third party with whom others of such merchants have a contract for the use of their premium advertising system, including the use of their coupons in connection therewith and the redemption thereof in merchandise. Said coupons are redeemed in accordance with printed catalogs or lists, which are distributed free amongst the customers and which contain a description of the articles which may be secured by the coupons and the number of the latter required to obtain them.

3. In the issuing and redemption of such stamps, tickets, coupons or certificates, no element of chance is involved; the value of each, both as to cash and merchandise, being fixed. The various articles given in exchange are staple articles of sound value and are open to inspection by all.

4. A number of the complaining merchants have entered into contracts with third persons for the use of their premium advertising system, including their coupons used in connection therewith, and for the redemption thereof in merchandise, which contracts run from one to five years and are and were at the time of the passage of the Act in force. A large amount of such coupons are in the hands of the plaintiffs, and if they are prevented from disposing of the same they will suffer great and irreparable loss.

5. Many manufacturers of various lines of merchandise, for the purpose of advertising their business and increasing the volume of their sales, enclose in packages in which said merchandise is put up for market, coupons, tickets, certificates and other premium tokens. The plaintiffs have on their shelves large quantities of such merchandise with which such premium tokens, as aforesaid, are packed, which entitle their customers to other articles of merchandise free of cost. Such coupons or premium tokens so enclosed in the packages delivered unbroken to plaintiffs' customers are given by various manufacturers of tobacco and tobacco products whose wares are extensively dealt in by plaintiffs, and said coupons and tickets are authorized and rendered lawful by Sec. 3394, R. S., as amended by the tenth section of the Act of Congress of July 24, 1897, as further amended by the second section of the Act of July 1, 1902.

6. By the use of said premium advertising sys-

tem and the giving of said coupons to their customers, plaintiffs are enabled to give a discount to small as well as large cash purchasers, one of said coupons being given with each five, ten or twenty-five cent cash purchase, or multiple thereof.

7. Plaintiffs' customers are entitled to receive and plaintiffs to give a much larger discount in merchandise than they otherwise would, because as a result of the large purchases of the merchandise given in exchange, the articles are secured at much less than the regular retail price, and plaintiffs are benefited because such articles in the homes of customers are a continuing advertisement for plaintiffs. By the use of said premium advertising system, plaintiffs have been enabled at a moderate cost to greatly increase their business and profits and especially their cash trade.

8. The method described in the bill of advertising and conducting the respective businesses of plaintiffs is a lawful one and is not prejudicial to the public health, safety, morals or welfare. The said Act of March 30, 1913, is prohibitive, and for reasons set forth in the bill is violative of plaintiffs' rights guaranteed by the Constitution of the United States.

9. The Prosecuting Attorney of Spokane County, whose duty it is to enforce the provisions of said statute, threatens to enforce the payment of said prohibitive tax and to bring numerous criminal prosecutions, as well as civil suits, to enforce the payment of said tax if plaintiffs continue to use said premium advertising system; and if plaintiffs are

forced to discontinue the use thereof, they and each of them will suffer great and irreparable damage as follows: Because the plaintiffs, relying upon their business and the method of conducting the same, as described, being a lawful business and a lawful method, have expended large sums in advertising such system, which expenditures will be a total loss to them if compelled to discontinue such method. And further, because plaintiffs have a large investment in stock on their shelves in which is packed premium tokens. Said tokens being so packed that they cannot be removed without destroying said packages and the value of the merchandise contained therein, plaintiffs will lose the amount invested therein. And because the plaintiffs, having issued large numbers of said coupons upon promise to redeem the same, will lose many customers and a large amount of trade if they are prevented from keeping faith by the redemption of said coupons.

Inasmuch as the plaintiffs have no adequate remedy at law, an injunctive order is sought restraining the Attorney General of the State and the Prosecuting Attorney and Treasurer of Spokane County from taking any proceeding at law or in equity for the collection of said tax and from the commencement of any criminal proceeding for a violation thereof.

The defendants below appeared specially, interposing a motion to quash on the ground that the Court is without jurisdiction because the suit is in effect a suit against the State. This was followed by

a motion to dismiss, upon the grounds (1) that there is a misjoinder of parties plaintiff; (2) that there is a misjoinder of parties defendant; (3) that several causes of action have been improperly united; (4) that the amended complaint does not state facts sufficient to warrant the Court in granting any relief whatever to the plaintiffs; (5) that the plaintiffs have a plain, speedy and adequate remedy at law; and (6) that the Court has no jurisdiction over the persons of the defendants or the subject matter of the action.

The motion to dismiss was submitted with the plaintiffs' application for a temporary injunction, said application being supported by various affidavits in support of all the allegations of the bill. (See Record, p. 40, et seq.) Upon a hearing before Gilbert, Circuit Judge, and Wolverton and Rudkin, District Judges, said Act was held void as violative of the XIVth Amendment to the Federal Constitution, and a temporary injunction issued as prayed in the bill. (See opinion by Rudkin, J., Record, p. 51.) The defendants declined to answer, and a decree *pro confesso* having been entered the injunction was made permanent. The appeal to this Court is from said decree.

ARGUMENT.

We conceive that the single question presented by this appeal for serious consideration is whether or not it is within the power of the lawmaking body of one of the states to prohibit by an enactment, such as the Act in question, a practice such as is described in

the bill, which, but for the enactment, would be legitimate. We shall contend that such attempted prohibition, as well as such arbitrary classification, is violative of the rights guaranteed us by those provisions of the XIVth Amendment which forbid that a state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.

It is not deemed necessary to notice the preliminary question raised by the motion to dismiss, further than to say that, as authority for the maintenance of this action to restrain state officers from the threatened enforcement of an unconstitutional enactment, our reliance is upon the doctrine of *Ex parte Young,* 209 U. S., 123, and *Western Union Tel. Co. v. Andrews,* 216 U. S., 165.

The Act Is Prohibitive.

It is hardly believed that the contention will longer be pressed with candor, that the attempted legislation is not and was not designed to be prohibitive. The Supreme Court of Washington, in the case of *State v. Pitney,* 79 Wash., 608, 140 Pac., 918, finds the Act prohibitive, and this in the absence of any showing upon the record beyond the terms of the Act itself.

It was contended in the State Court in the *Pitney* case that, inasmuch as there might be concerns of such magnitude that an annual tax of $6,000 would not mean their destruction or even serious impair-

ment, one who complains of the legislation must show himself to be without that class under the rule of *Murphy v. California,* 225 U. S., 623, and *Rosenthal v. New York,* 226 U. S., 260.

It has been believed, however, that no allegation or proof is necessary to impel to a conclusion which may not be avoided save by disregarding that common knowledge and experience which courts possess and apply, and that, therefore, the Act would be assumed to be generally prohibitive without an affirmative showing.

This controversy is, however, not open in the present case, inasmuch as the motion to dismiss admits that as to us the legislation is prohibitive in view of the specific disclosure in the bill that in each instance the *gross return* of the business of the various plaintiffs does not equal or exceed the amount of the tax.

Character of the Business.

Assuming then the Act to be prohibitive in character, it becomes necessary to scrutinize, as it is disclosed in the bill, the conduct of the plaintiffs in making use of the premium coupons in their business to discover if there inheres in such conduct of a business any element, actual or potential, which may make that business a proper mark for the police power of the State.

Simply stated, the plaintiffs' plan is this: They seek to obtain the favor of possible patrons and to induce the payment of cash for purchases by tendering a discount upon such purchases. This discount

is evidenced by a card, ticket or coupon, which constitutes a memorandum of the amount of discount to which the customer under an invariable rule has become entitled. Upon presentation the merchant makes good the amount so evidenced, either in cash (as provided by the Washington law) or, at the option of the purchaser, in articles of merchandise of the customer's selection. Such selection is made from catalogs furnished in advance, with prices appended, out of articles constantly displayed, so that any element of chance, lottery or deception, is entirely wanting. The card or memorandum is redeemed in some instances directly by the merchant issuing it; in other instances, for him by a third party with whom he contracts to furnish him the cards or coupons and who keeps on hand a stock of the articles cataloged for their redemption.

In its last and simplest analysis, this is the conduct which the State of Washington has sought to forbid that a person within its jurisdiction shall follow under pain of a gross penalty.

To Prohibit Such Conduct Is Contrary to the "Law of the Land."

Such legislation may not be plausibly defended save by the contention that it is within the "police power" of the State. Avoiding controversy as to the proper meaning of that much mooted term, and realizing that our difficulty lies not in its definition but in its application, we take the broadest expression that may be found and assume that the police

power of a state authorizes it to "provide not only for the health, morals and safety of its people, but for the common good, as involved in their well-being, peace, happiness and prosperity." (*Halter v. Nebraska*, 205 U. S., 34.)

It is not doubted that logic and the principle of self-government has required the broadening of the definition of the term as it is given above, but it is nevertheless confidently believed that they are much in error who conclude that the Court by adopting a definition of such amplitude has meant to say that a State Legislature may arbitrarily override the conventional restrictions of the Federal Constitution and deprive an individual of proper liberty of conduct or natural fundamental rights.

Mr. Justice Brewer spoke for the Court in *Gulf, Colorado and Santa Fe Ry. Co. v. Ellis*, 165 U. S., 150, 154:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

Speaking in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79, 105, the same Justice pertinently asks:

> "Is it true in this country that one who by his attention to business, by his efforts to satisfy

> customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife?"

The question as stated by Mr. Justice Day in *Dobbins v. Los Angeles,* 195 U. S., 223, 236, is likewise pertinent:

> "* * whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

Or, as Mr. Justice Brown, speaking for the Court, said in *Lawton v. Steele,* 152 U. S., 133, 137:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

The statement of Mr. Justice Brown in *Holden v. Hardy,* 169 U. S., 366, 398, may well be kept in mind:

> "The question in each case is whether the legislature has adopted the statute in exercise of

a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

Keeping these announcements in view and passing to the other side, we at once concede that one may not hope to secure the mandate of this Court striking down an act of the State Legislature, be it prohibitive or regulative, when there can be discovered a *real* or *probable relation,* or one otherwise than *artificial,* between that enactment and the public welfare. Nor may we hope to induce this Court to deny to the Legislature the function of determining in its discretion the wisdom or propriety of the policy it discloses, provided this real relation exists.

Conceding then, freely, this rule, and making no plea for its abatement or limitation, our inquiry may now be addressed to this question: Does the enactment bear a legitimate relation to the public welfare, or is that relation so entirely artificial or fanciful that we are justified in the declaration that the Act is designed for the spoliation of a certain class and the interference with a lawful business, not for the benefit of the public at large but for the advantage of a class of competitors of those at whom the enactment is aimed; and that those incidents of the business which it is claimed make it relate to the public welfare are no more than the after-fancy of the ingenious protagonists of such legislation?

To solve this question, it will be proper to consider

separately every suggestion that has been made by counsel who seek to uphold this Act, as well as those adverted to in the multitude of adjudicated cases where like legislation has been almost without exception declared invalid.

In giving frank consideration to the suggestions as to how this enactment might *possibly* be made to relate to the public welfare, we shall not put out of our view the rule announced by this Court in *Mugler v. Kansas*, 123 U. S., 623, 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty —to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no *real* or *substantial relation* to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." (Italics ours.)

Does the Prohibition of Discount or Premium Tokens Fall Within the Police Power Upon the Theory that the Giving of Such Tokens May Induce to Extravagance?

That the business or practice sought to be prohibited may have a tendency to tempt a customer to enlarge his expenditures is a favorite argument of those who have contended for the constitutionality of such legislation. It is argued from this that inasmuch as it may be believed by the Legislature that

the public welfare requires the abridgement of extravagances, legislation looking to that end and reasonably designed for that purpose is within the police power.

This we may not concede unless we are willing to allow that the spirit of our institutions will permit the enactment of those laws which were anciently experimented with under the name of "Sumptuary Laws"; for if sought to be defended upon this ground alone the Act is nothing else.

Sumptuary Laws.

Putting to one side those laws which relate to the traffic and consumption of intoxicating liquors, which have by some writers been loosely classified under this head but which depend for their justification upon an entirely different principle, and passing also laws for the restraint of spendthrifts, which are based upon the theory of mental weakness or the prevention of debauchery, we refer only to that character of legislation which has been sought to be justified and which, indeed, was anciently deemed to be expedient upon the theory that it made against personal extravagance. May the natural liberty of the citizen be abridged to that end?

We think it can be demonstrated that at the time of the settlement of the colonies and the adoption of our Constitution such attempted limitations upon the right of free action were outworn and had been demonstrated to be inconsistent with that free institution into which it was designed to form our government.

Such laws were the subject of frequent experiment in the Roman Republic, and were generally found within a short time to be inefficacious. (Note the repeal of the Oppian law, designed to prevent the extravagant dress of women.—Livy's "History of Rome", Book XXXIV.)

At the time of Augustus (18 B. C.), it is related that the Puritan faction secured the enactment of the *lex sumptuaria,* together with other laws abridging natural rights which were shortly seen to be impractical. (Ferrero's "Republic of Augustus", Chap. III.)

See, also, the answer of the Emperor Tiberius to the demand for a law to stem luxury ("Annals of Tacitus", Book III, Chap. 54):

> "So many laws made by our ancestors, so many added by the deified Augustus; the former being lost in oblivion, and (which is more heinous) the latter in contempt, have only rendered luxury more secure."

Throughout the Republic and the empire until its fall, such laws and kindred legislation abridging individual freedom were enacted in the hopeless effort to preserve a government whose so-called constitution was but a "rope of sand" for the lack of any dependable guaranty of individual rights.

In the early history of England the feeble experiment was repeated. James Anthony Froude ("Reign of Henry VIII", Chap. I), after comment upon the Acts of Parliament which had been designed to pre-

vent extravagance in living in the Fifteenth Century, says:

> "Sumptuary laws are among the exploded fallacies which we have outgrown, and we smile at the unwisdom which could expect to regulate private habits and manners by statute."

Hallam, speaking to the same subject, says:

> "The principle of sumptuary laws was partly derived from the small republics of antiquity which might, perhaps, require that security for public spirit and equal rights—partly from the austere and injudicious theory of religion disseminated by the clergy. * * * Laws, indeed, designed by those governments [France and England] to restrain the extravagance of their subjects may well justify the severe indignation which Adam Smith has poured upon all such interference with private expenditure."
>
> Hallam's "Middle Ages", Chap. IX, Part II, p. 602.

Such laws had met the general reprobation of those publicists whom we find speaking to the subject prior to the adoption of our Constitution. In the first edition of his "Wealth of Nations", published in the year of the declaration of our independence, Adam Smith remarks:

> "It is the highest impertinence and presumption therefore in kings and ministers to pretend to watch over the oeconomy of private people, and to restrain their expence either by sumptuary laws, or by prohibiting the importation of foreign luxuries."

David Hume had given out the early chapters of his English History in 1761. He spoke in detail of

the various attempts by law to limit luxury and prevent extravagance during the reign of Edward III in the Fourteenth Century, and concludes with this observation:

> "It was easy to foresee that such ridiculous laws must prove ineffectual and could never be executed."
>
> Hume's "History of England", Vol. 2, Chap. XVI, p. 276.

Blackstone had condemned the sumptuary laws of Edward IV as being subversive of liberty while giving his countenance to a law prescribing the dress of the dead, upon the ground that it was designed to encourage the manufacture of the fabric prescribed. *(Cooley's Blackstone,* Book I, p. 125.)

The founders of our government had before them the experience of their forebears with the various statutes of Elizabeth in the Sixteenth Century, which almost at once upon passage were found to be so oppressive and impractical as to require repeal. (See Stickney's State Control of Trade & Commerce, Chap. I.)

Pursuant to a resolution of the Continental Congress in 1777, inviting action by the various Legislatures to enforce a temporary regulation of the price of commodities during the war, New York and Massachusetts enacted laws having a slight smack of the sumptuary. (Stickney's State Control of Trade & Commerce, pp. 100, 105.) They were soon found to be ineffectual and were repealed within a year.

It is not to be doubted that the makers of the Constitution drew for their assistance upon every item of classical and English history. With this experience and observation before them, it is not to be wondered at that they were willing to accept the proposition that sumptuary laws were subversive of natural rights and could find no warrant in expediency or practicability. This is well disclosed by the proceedings of the famous convention, where a proposition to enable Congress "to enact sumptuary laws" was rejected by a vote of eight of the states to three, apparently upon the ground that it was believed that sumptuary laws were contrary to nature. (See Madison's Journal of August 20, 1787, in Farrand's "Records of the Federal Convention", Vol. II, p. 344.)

We are not, of course, misled into construing the foregoing as evidence of an intent upon the part of the framers of the Constitution to place a specific limitation upon the power of the States to enact sumptuary laws. It, however, serves to demonstrate the prevailing view of the delegates at that time.

The better part of a century then elapsed before the XIVth Amendment was adopted, during which no such invasion of private rights or new experiment with the outworn theory was (so far as our research informs us) ever attempted by the States. We must conclude, therefore, that security from such invasion was assumed to be part of the law of the land.

An argument against the policy of any sumptuary

law, and one which would demonstrate its absurdity and impracticability, would be easy to frame. Such consideration, however, is not for the Court to indulge. Those jurists, however, who have spoken to the subject base their condemnation of such laws not upon the ground of policy but upon the assumption that they are violative of fundamental rights. Judge Cooley says:

> "In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the *fundamentals of our law.* * * * But in a free country such laws when mentioned are condemned instinctively." (Italics ours.)
>
> *Cooley's Const. Limitations* (7th Ed.), p. 549.

Tiedeman says upon the same subject:

> "In proportion to the growth of popular yearning for personal liberty, these laws have become more and more unbearable, until now it is the universal American sentiment, that these laws, at least in their grosser forms, and hence on principle, are violations of the inalienable right to 'liberty and the pursuit of happiness,' and involve a deprivation of liberty and property—through a limitation upon the means and ways of enjoyment—without due process of law."
>
> *Tiedeman's Lim. of Police Power,* p. 154.

In *People v. Gillson* (N. Y.), 17 N. E., 343, the Court had before it a statute prohibiting one who sells food from giving therewith any other article as a premium or gift. Holding that the Act was not a proper exercise of the police power, Judge Peckham spoke for the unanimous Court, as follows (p. 348):

> "I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article of food, in order to get the other article with it which comes to them in the shape of a gift, and the poorer people are led to extravagance in outlay."

In *Humes v. City of Little Rock,* 138 Fed., 929, 933, Judge Williams treated this suggestion as follows (in holding legislation of a similar character violative of the Federal Constitution):

> "It may be that some persons may be led by complainant's scheme into foolishly buying more than they need, merely to get the stamps, and it is certain that in the end the premiums must be paid for by the public. But these are commercial, not judicial, considerations, and the remedy must be sought in the wisdom and experience of the citizen, not in the legislative interference. Ours is not a paternal government. The freedom of our institutions often permits the unwary to be entrapped, but the advantages derived from the resulting spirit of independence and enterprise far more than outweigh any evil that can follow the incidental abuses of liberty."

In *People v. Zimmerman,* 92 N. Y. S., 497, 501, the Court answers the same argument as follows:

> "It may be that people in moderate or straitened circumstances are prone to purchase beyond their means by the incitement of a gift after a stated amount has been expended. The farmer who attends an auction sale is often disposed to buy what he does not need, led along by the competition in the bidding, or by the fact that time is allowed on the purchase. If a grocer of the city of Rochester should reduce the price of flour or coffee below cost, it might tend to the demoralization of the grocery trade in that city, and would certainly be exasperating to his competitors. These slight derelictions may be imprudent, but they are not the subject of legislative control. It is fundamental that the widest scope is accorded to the individual in the prosecution of his business, if only that business be lawful and be conducted in a lawful manner."

In *Seattle v. Dencker* (Wash.), 108 Pac., 1086, there was before the Court the validity of an ordinance taxing the sale of goods by means of any automatic device, there being no element of chance. Referring to the suggestion that such a device might induce to extravagance of expenditure and the consumption of cigars to a hurtful extent, the late Judge Dunbar, whose acumen and soundness have made his memory revered among members of the profession in the Northwest, naively and forcefully remarked (p. 510):

> "A strict or puritanical conception of the business of selling cigars might be that it was harmful to the health of the consumers, but the mode of selling them would not enter into that thought. Nor can the objection that it is particularly attractive be urged, for handsome girls

> are ordinarily employed around hotels for the purpose of selling cigars, and no doubt many susceptible men are induced to buy more cigars than they otherwise would by reason of the employment of this delivery agency.
>
> * * * * * * * * *
>
> If this ordinance can be sustained, there is no limit to the arbitrary, capricious, or tyrannical imposition of taxes, and the constitutional guaranty that 'no law shall be passed granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations,' becomes a dead letter. Discrimination to the extent exhibited in this ordinance discourages enterprise, paralyzes progress, is a deprivation of liberty, and is entirely inconsistent with the true principles and the genius of our government."

It is needless to say that prior to the decision of the Washington Court in the *Pitney* case (140 Pac., 918) Judge Dunbar had passed away and Judge Rudkin, who wrote the decision in the present case, had gone to the Federal Bench.

We are not unaware that this Court has suggested that those arguments are not convincing against the exercise of the police power which are directed toward a recitation of other like evils which the State neglects to tax or prohibit. (Such we construe to be the intimation in *Pullman Co. v. Knott,* 35 Sp. Ct. Rep., 2, *Patsone v. Pennsylvania,* 232 U. S., 138, *Keokee Con. Coke Co. v. Taylor,* 34 Sp. Ct. Rep., 856.)

Nevertheless, we assert that the absurdity of a contention may often be best demonstrated by a

reference to what might fairly follow in the train of the logic relied upon to support that contention. While it is true that no datum may be established to which we may tie in defining the police power, and, as aptly expressed by Mr. Justice Holmes in the *Noble* case (*Noble State Bank v. Haskell*, 219 U. S., 104, 112), the "lines are pricked out by the gradual approach and contact of decisions on the opposing sides", it is nevertheless suggested that those who contemplate an invasion of private rights by statute will always with propriety look to a decision of this Court upholding a statute, as within the police power, as warrant for further invasion, if an ineluctable logic carries from one to the other.

Upon this principle it is fair to remind ourselves of the character of legislation we may expect to be upheld if the present enactment is found to be within the police power, for the reason that it is (supposedly, of course) designed to prevent extravagance.

Any act to prohibit a merchant from tempting or inducing custom in any way would by irresistible logic be equally valid. A vendor of goods might not cry his wares, or the merchant dress his window to attract the passer-by. The present practice of presenting articles of food in an attractive manner, to appeal to the appetite and tempt one to an unhealthful gorging, may fall under the ban of an arbitrary or erratic legislature. Newspapers might well be forbidden to carry their insistent advertisements. The merchant might not be permitted to gather

crowds by a clearance sale, where he "tempts" the purchaser by a reduction of price. The corner grocer, who in our childhood tempted our return by the contribution of a stick of candy, might find himself within the prohibited class. Indeed, if it may be declared illegal to offer the discount evidenced by one of the plaintiffs' premiums, the application of an identical rule of logic would make it well within the police power to forbid that one merchant (for the purpose of inducing trade, which is always the purpose) undersell another. This would, of course, necessitate the establishment of a minimum price for commodities, and if the law was not to be discriminatory such price must be fixed for all commodities which are the subject of sale.

Argument is deemed hardly necessary to establish the proposition that under our system the price of *private* contract may not be controlled by law. In *German Alliance Ins. Co. v. Kansas*, 233 U. S., 389, 421, although the majority of the Court upheld the right of the Legislature to fix insurance rates solely upon the ground (as we understand the decision) that the business of insurance is affected with a public interest, Mr. Justice Lamar in his dissenting opinion makes use of the following language:

> "Lord Ellenborough * * * was able to say, in *Allnutt v. Inglis*, 12 East, 527, 538, 'that the general principle is favored, both in law and justice, that every man may fix what price he pleases for his own property or the use of it.' But what was a favor in England, that might at any time be withdrawn, was in this country

made a constitutional right that could not be withdrawn."

The following cases are cited in the opinion, where statutes fixing prices have been held void:

Ex parte Dickey, 144 Cal., 234;
Ex parte Quarg, 149 Cal., 79;
People v. Steele, 231 Ill., 340;
State v. Fire Creek Coal & Coke Co., 33 W. Va., 188, 10 S. E., 288.

There are governments which, under the easy name of "paternalism", may thus abridge freedom of conduct, but such a power, we respectfully submit, is not within the present conception of our institutions, but, upon the contrary, the exercise would meet with the instinctive condemnation of which Mr. Tiedeman speaks.

Nor are such possibilities fanciful. When we observe that in the face of repeated decisions from the Courts of almost half the states of the Union, condemning such enactments as subversive of rights protected by fundamental law, our competitors have secured legislation aimed at our destruction because our plan is judged to be profitable to us and therefore to their disadvantage, we can see no certain limit to oppression or the possible invasion of rights by competitors.

The fact that legislation in the past has been measurably free from such attempts is no guaranty for the future, once the way has been pointed out that such special and selfish legislation may be sustained by a suggestion that it may relate to the public welfare.

Theoretically, but only upon theory, the Legislature may be trusted to discover the impracticability and unwisdom of such legislation, but in the meantime we will have been deprived of our privilege to conduct a legitimate business and despoiled of our property.

Does the Possibility that Such a Plan May Foster Intermediate Concerns Bring the Enactment Within the Police Power?

It will be observed that our bill avers that some of the plaintiffs redeem their own premium tokens. As to them, of course, the phase we are about to discuss does not apply. It is averred, however, that a portion of the plaintiffs purchase their coupons from a company which agrees to redeem those coupons and which carries a large stock of assorted articles for that purpose. An argument used by those who are opposed to us is to the effect that this makes a place for the middleman, who enjoys a profit out of the plan. To discover the innate unsoundness of this argument, it is necessary only to consider the possible growth and development of the plan which is described in the bill and thus to conclude that the growth has been exactly along the lines of other business, the legitimacy and fairness of which may not be doubted.

Let us, at the risk of tediousness, carry the analysis further.

It may be instructive to consider the view other Courts have taken as to this contention. The Su-

preme Court of Kentucky, in the case of *Commonwealth v. Gibson Co.*, 101 S. W., 385, 386, says this:

> "Enterprising companies conceived the plan that independent trading stamp companies might profitably be established that would furnish to merchants for compensation stamps to deliver to purchasers; the stamps being redeemable at the trading company's establishment in articles kept by it. In this way, the merchant would be enabled to advertise his business by offering free of cost trading stamps which purchasers could take to the establishment of the trading stamp company and receive without charge some article equal in value to the amount represented by the trading stamps they had."

In the beginning the merchant sought to induce trade by offering some article as a premium to his customer; and surely it was never thought that this practice might be prohibited. This grew until the choice of several articles was offered. These articles the merchant might carry upon his shelf and deliver from his store; but, quite naturally, as the business enlarged it might become in certain instances undesirable or inconvenient that the merchant carry all these articles. As is always the case when convenience or economy demands, a new plan or arrangement is worked out. Solely because there was a demand for it, there came into being concerns known as trading stamp companies, which, in certain instances, would furnish the merchant with his premium tokens and would attend to the redemption thereof out of a large stock which they provided, thus relieving the merchant of the expense and inconvenience of carrying the stock of premium arti-

cles himself. It is to be presumed that this concern which intervened would provide for a profit for itself, but it is never to be presumed that this profit would be extortionate. The inexorable laws of trade will provide sufficient guaranty here as in other avenues of business.

In our more primitive condition the middleman was unknown. Convenience, however, soon required that barter and exchange between individuals be accomplished indirectly; in other words, that there intervene the individual who would purchase a commodity from one and furnish it to another. This practice has become so well fortified by age and so grounded in necessity that it may not be doubted that its abolition generally by legislation would be subversive of natural rights.

As well might it be contended that the grocer who purchases eggs from the farmer and sells them to the consumer, making in the transaction a profit for himself, could by law be prohibited from the conduct of his business. As well may the banker who acts as the middleman between the getting and spending, and thereby makes a profit, be prohibited by a positive law. Every broker or factor or individual or concern which, for the convenience of trade, acts as the nexus between the seller and the purchaser may be logically caused to fall within the prohibited class if the exercise of the police power in this instance is justified upon the ground suggested.

The Supreme Court of Minnesota in *State v. Sperry-Hutchinson Co.*, 126 N. W., 120, had before

it the validity of an act defining gift enterprises, and held there that the business of issuing and redeeming trading stamps by a company engaged exclusively in that business (in the same manner in which it is alleged the coupons are sold and redeemed in the present bill) was not an enterprise which it was within the power of the Legislature to condemn. Referring to the argument that the existence of such concerns might make it possible to take undue advantage of the customer, the Court says (p. 125):

> "The profit in respondent's business is the difference between the amount received from the merchant for the stamps and the cost of the articles offered in redemption, less the cost of running the business. The profits may be large; but that alone does not furnish ground for the prohibition of the business. No doubt some stamps are lost, some books are not filled out, and hence never presented for redemption. To that extent the company is the gainer. The same advantage exists when the scheme is conducted by the merchant; but, even if there is a distinction in this feature between the merchant and the company, *it has not been made to appear from the petition that the collectors of stamps pay any additional value for them.* They are at liberty to take them, if they so desire; but we discover no element of deception or compulsion." (Italics ours.)

In *City & County of Denver v. Frueauff*, 88 Pac., 389, the Supreme Court of Colorado had before it an ordinance designed to prohibit the giving of premium tokens, such as are described in the present

case. In holding such ordinance to be without the police power, the Court says (p. 394):

> "The fact that the stamps are redeemed at a place other than the one where they are issued certainly does not introduce into the scheme any element of chance. We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase, and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not, in law, vary the case or change the real and substantial character of the transaction."

In *State v. Ramseyer,* 58 Atl., 958, the Supreme Court of New Hampshire held invalid an act which prohibited the giving of a premium token redeemable by any person *other than the person making the sale;* and answered the argument that the intervention of the trading company was an economic waste, as follows (p. 962):

> "The argument is advanced in behalf of the prosecution that the ultimate effect of the existence of the trading stamp companies is the imposition of a compulsory, unnecessary, and useless tax upon the entire community, and hence is detrimental to the welfare and prosperity of the public. It may be that the strict, logical reasoning of political economy supports that conclusion, though it might not meet with universal acceptance. But, however that may be, it is equally true that other methods of commercial enterprise, in the ultimate analysis, would turn out to be expensive to all and useful

> to few or none, entailing a public burden attended with no public benefit."

In the case of *State v. Dalton,* 46 Atl., 234, the Supreme Court of Rhode Island gave most elaborate consideration to every argument which it has been possible to present against the use of the premium token. Considering that phase of the plan which was involved by reason of the fact that a third party intervened to redeem the coupon, the Court says (p. 236):

> "To illustrate: A. buys of B. 20 pounds of sugar for a dollar, and is given with the purchase an order, check, stamp, token, or some kind of device,—no matter what,—which, upon presentation to C., entitles A. to some other specific article of merchandise in addition to the sugar. How does such a transaction differ in principle from one where A. receives the premium for making the purchase—for such it really is—directly from B. himself?"

In the case of *People v. Dycker,* 76 N. Y. S., 111, the statute held invalid by the Court forbade the issue or distribution of stamps to be redeemed by any person other than the one selling the goods, holding (following the case of *People v. Gillson,* 109 N. Y., 389, 17 N. E., 343) that the giving and direct redemption of the premium ticket could not be prohibited. The Court found no distinction between that practice and the practice of securing the redemption of the stamp by a third person. The Court says (pp. 115, 116):

> "The prohibitive part of section 384p aims at the practice of issuing trading stamps that

> are to be redeemed by any person other than the merchant who distributes them or the manufacturer of the packages of goods sold. Just what there is in the thing prohibited differing from the thing expressly authorized that makes it inimical to the public welfare and general safety does not appear."

In *People v. Zimmerman*, 92 N. Y. S., 497, the same Court considered the validity of the statute requiring one dealing in coupon tickets to redeem the same in goods or money, at the option of the holder, but excluding from its provisions coupons issued and redeemed directly by a merchant in his own name. This was held to be an arbitrary discrimination, inasmuch as there could be no real distinction warranting discrimination under the police power between those who redeemed their stamps directly and those who accomplished the same result by the intervention of a third party. The Court says (p. 502):

> "It cannot be so reprehensible as to be a crime to issue a coupon ticket redeemable by a third person, but be without sin to issue one redeemable by the seller of the goods.
>
> * * * * * * * * *
>
> If the seller, by arrangement with a responsible company, secures the performance of the agreement, and the arrangement is satisfactory to the buyer, it would seem that such a plan ought not to be made a crime, while redemption by the merchant is deemed an honest transaction. The statute is not founded on the moral plane pretended, but belongs to that class of legislation designed to drive out of business a successful competitor."

In the case of *City of Winston v. Beeson,* 47 S. E., 457, the Supreme Court of North Carolina held that dealers in trading stamps sold to merchants, redeemable in goods offered by the trading stamp company, could not be restricted under a provision in the City Charter authorizing a license tax upon a "gift enterprise", and the Court there declined to view as material the distinction between the redemption of the stamps directly and through the intervention of a concern which sold and redeemed the stamps. The Court says (p. 461):

> "We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase; and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not, in law, vary the case, or change the real and substantial character of the transaction."

The allegations of the amended bill disclose that in those instances where the premium tickets are issued and redeemed by third parties, the plan involves no element of waste or possible imposition which is not equally possible in any other legitimate business. It charges (see paragraph V) that the articles given in exchange for the stamps or coupons are staple articles of sound value and durable manufacture; and this must be taken as admitted. Nor can it be assumed that this business affords unusual opportunity for imposition upon the customer. If there should be a divergence between the real value

and the represented value of any article given in exchange, or if a third party making the redemption should attempt to secure too high a profit, it must be assumed that such possible evils will be regulated and prevented by the very rules which regulate all intercourse between the vendor and the purchaser. It must be assumed that, according to economic rules, such a practice would mark the death of this enterprise, as it would of any other legitimate enterprise illegitimately conducted. No patron is compelled to take the tokens or to patronize a merchant who uses them, for these merchants exercise no public or exclusive function. The element of compulsion being entirely lacking, there is no more room for extortion or waste than in any other enterprise.

If, then, the practice of giving a premium or of giving a token, redeemable directly, is not of such a nature as to allow of its prohibition under the police power, the intervention of a third party upon whom the merchant, for economy or convenience sake, depends to make the redemption does not afford a material distinction which will warrant a discrimination by the State.

There is no greater soundness in another and kindred argument which has been encountered, namely, that the practice enables a concern which sells premium tokens and furnishes the articles for their redemption to force its contracts upon merchants. It has been suggested that such a concern, having secured a contract with one or two merchants in a community and thereby demonstrated

the attractiveness of the plan, would be in a position to force the plan upon other merchants who desire to compete. Before such a suggestion may be seriously entertained, we must dismiss from our minds any idea of the natural operation of the laws of competition. Were it possible for any one concern issuing and redeeming such coupons to enjoy an exclusive franchise, the argument would approach nearer to the plausible.

The argument amounts to no more than this: The concern which issues and redeems the premium tokens has hit upon an attractive and advantageous method of advertising and inducing trade. Though otherwise entirely legitimate, it may be prohibited, inasmuch as merchants generally may be compelled to adopt it in order to meet competition. If one should invent or manufacture some particular article in common use, could it fairly be prohibited upon the theory that its excellence and desirability was such that merchants might feel themselves compelled to purchase and carry it in their stock in order to meet competition? The propositions are believed to be directly analogous. This argument is well answered by the case of *State v. Ramseyer* (N. H.), 58 Atl., 958, 962, as follows:

> "If it necessarily results from the trading stamp business that all retail merchants must eventually patronize the stamp companies or go out of business, the same logic would authorize the conclusion that all traders must advertise their business, and that, in that event, the entire public could be subject to a large expense without deriving any benefit therefrom."

The observation is not unwarranted that no body of legislators would be found with the temerity to attempt to discriminate against advertising through the newspapers, for a very palpable reason.

It is deemed not improper at this point to state that the attack of the competitors of those who in their business use the premium tokens has not been confined to action through legislatures. It is possible that an impression more or less common has been given out that either there exists in this practice something inherently vicious or that it affords opportunity for misrepresentation, deceit, waste or extortion.

It may be confidently asserted that the record in this case discloses no such inherent vice in the practice nor any opportunity for imposition which does not exist in the conduct of any other business. With equal conviction it may be declared that all the possibilities of wrong, waste, or deceit, which have been suggested as attending the practice of using the premium token have been fairly dragged into this case by the heels.

If, by reason of constitutional guaranties, there exists any limit to the exercise of the police power, it is not possible that the State may, under the guise of that power, prohibit a lawful practice or business merely because there may, indirectly, grow out of such business or practice something fairly obnoxious to the public welfare. It is difficult, indeed, to conceive of any legitimate business which may not be so perverted. This, however, furnishes no justification

for the laying of the axe to the very root in every instance.

As it was well put by Judge Cushman in a dissenting opinion lately filed in the case of *Wiseman v. Tanner* in the Western District of Washington, wherein it is sought to uphold the constitutionality of an act prohibiting private employment agencies upon the theory that they are liable to abuse, "We may rid ourselves of the barnacles by sinking the ship, but this is not reasonably necessary."

The police power could hardly extend far enough to entitle the Legislature to prohibit the raising of horses upon the theory that such animals may be used for racing, and, therefore, afford exceptional opportunities for the exercise of the gambling vice. The production of corn could hardly be inhibited merely because it may be eventually used for the manufacture of alcohol. By a parity of reasoning, if the giving of discounts or premiums and the evidencing of them by tokens is legitimate, it will be time enough for the intervention of the police power when the business or practice has become perverted, as the appellants suggest it may be by the intervention of extortionate middlemen or trading stamp companies. The power of the State may then be invoked to prevent this perversion without an interference with constitutional rights.

We are free to concede that if a business or practice is of such a character as to afford, with fair directness, some *exceptional* means of imposition, it would be within the police power of the State to

discriminate against it by taxation for the purpose of regulation; and it might, indeed, be possible to prohibit it. But those opportunities must be something more than the attenuated possibilities such as we have commented upon.

Our apology for the extended discussion of these suggestions is that they comprise the only arguments we have heard advanced to establish that the use of the premium token may make possible conditions which warrant the intervention of the State in the exercise of its police power.

The Act Denies to the Plaintiffs the Equal Protection of the Law, Because the Attempted Classification for the Purpose of a License Tax Is Purely Arbitrary.

Putting to one side for the moment consideration of the prohibitive character of the enactment, in order that this portion of the argument may not trench too far upon what we have heretofore said, we assert that the State of Washington in selecting the plaintiffs for taxation have acted arbitrarily and denied to us the equal protection of the law.

We assume, as being beyond controversy, that a state has the power to select objects for the imposition of a license tax, and for that purpose may make such classification as it determines. This rule is, however, subject to the qualification that there must be some substantial basis for the classification. You say in *Southern Ry. Co. v. Greene,* 216 U. S., 400, 417:

> "While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

You say in *Bell's Gap R. R. Co. v. Pennsylvania,* 134 U. S., 232, 237:

> "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

In *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S., 150, 155, this Court quotes with approval the statement of Judge Black in *State v. Loomis,* 115 Mo., 307, 314:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 562, you say:

> "A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity."

It is not believed necessary to further fortify our contention as to the rule announced by these decisions. The members of this Court have differed as to the application of these rules but have never gainsaid their correctness.

May we be permitted to review, in some detail, the character of the business conducted by the plaintiffs and the incidents which have had a part in the evolution of the general plan of premium tokens, to ascertain whether or not a business which makes use of said tokens so differs in its conduct from the conduct of any other business within the state that the difference affords a real and substantial basis for classification.

It clearly appears from the bill that these complaining merchants are not classified for the pur-

pose of taxation because of the business in which they are engaged, but rather because of the method or means adopted by each in carrying on his respective business, to-wit, the advertising of his business by the use of premiums and the giving of a discount to encourage cash trade. In other words, (putting to one side the prohibitive character of the Act) it is an attempt to levy an annual license tax upon the plaintiffs for an incident of their business.

It appears from the allegations in paragraphs IV, VIII and IX of the amended bill, found at pages 31 and 33 of the record, that the plaintiffs have adopted this method of giving a coupon, stamp or certificate with each five and ten cent purchase, or multiple thereof, for the purpose of encouraging cash trade; that by providing the said coupon shall be redeemable in merchandise as well as cash, the complaining merchants will thus be enabled to give a much larger discount in merchandise to their customers, for the reason that the articles of merchandise so given are purchased by them or by a third party with whom they have contracts in large quantities at manufacturers' or wholesale prices, and therefore at much less than the regular retail price of the same.

Most purchases are in small amounts, and by giving the purchaser a stamp or coupon as evidence of a cash payment the merchants are thereby enabled to give a discount with small purchases of goods as well as large, the customer being entitled, when he

has collected and saved a certain number of said stamps or coupons, to present them as evidence of cash trade, thereby entitling him to receive either cash or another article of merchandise of his choice, free of charge, the stamps and coupons being merely the method devised for keeping account of the amount of such cash purchases. Or, in other words, *these stamps constitute the bookkeeping for both the merchant and his customer.*

That the practice of giving a discount for cash trade is a general one is a matter of common knowledge. With large purchases from the wholesaler, or, indeed, from a retailer who conducts a large business, the measuring of the discount is a simple matter. Without, however, some such method as that adopted by the complaining merchants, the giving of a uniform discount for all purchases, however small, would be impractical because of the difficulty in keeping account of the amount to which the small purchaser is entitled by way of discount under a uniform system. For the convenience, therefore, of both the purchaser and seller and to avoid an involved and impossible system of bookkeeping and to the end that each purchaser, however small, may participate in a uniform discount, this method has been evolved.

Not attempting at this particular place to discuss the legal question involved, but merely for the purpose of assisting the Court in arriving at a clear understanding of the method adopted by the plaintiffs and the object thereof, we quote from some of

the opinions of other Courts the following observations as to the character of the business.

In *Ex parte Drexel and Holland* (Cal.), 82 Pac., 429, 434, the Supreme Court of that state says:

> "Indeed, an ordinary trading stamp or coupon is, in substance, a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract. It may be distasteful to certain competitors in business; but the latter should remember that, if a statute suppressing it be upheld, then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract, to which these competitors would strenuously, but vainly, object."

In *Ex parte Hutchinson,* 137 Fed., 949, the District Judge, in holding invalid an ordinance levying an annual license tax of $100 on merchants using this system, said:

> "The giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned and it is not obnoxious to public policy."

In *Ex parte Hutchinson,* 137 Fed., 950, 951, Judge Bellinger, then of the United States District Court of Oregon, quotes the foregoing statement with approval.

In *Sperry & Hutchinson Co. v. Temple,* 137 Fed., 992, 993, Judge Putnam, of the Massachusetts District, says:

> "The trading stamp business is essentially legitimate, and, so far as the court can discover,

it is the only way in which the small purchaser practically obtains a discount for immediate payment, whether that immediate payment is in cash or anything else."

In *City of Winston v. Beeson* (N. C.), 47 S. E., 457, 461, the Court, in passing upon the validity of this method of advertising and giving a discount for cash trade, in the course of its opinion holding such method lawful, says:

"The plan, as outlined in the verdict, seems to be one for advertising the merchant's business and his wares, and enabling him to sell his goods for cash instead of on time. This, it must be conceded, is an advantage to him. It is also a benefit to the customer, who practically receives a discount, *and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his means.*" (Italics ours.)

In *Commonwealth v. Gibson Co.* (Ky.), 101 S. W., 385, the Court, in passing on an act levying an annual license on merchants adopting this method of advertising and giving a discount for cash trade, says:

"A merchant, as a business proposition, might find it profitable to give a discount or rebate to persons who paid cash, withholding this advantage from those who purchased on credit. If a merchant advertised that he would sell for cash any article in his store at 4 per cent. less than the marked price, we cannot perceive any valid objection that could be urged to it, and it is plain that this practice would not violate either the letter or the spirit of the statute. Nor is there any substantial difference in the principle involved between selling an article at

4 per cent. under its marked price, and selling it at the marked price and giving to the purchaser a ticket or check representing the discount, with which ticket or check he can purchase an article in the store, the cost price of which is the same as the value of his ticket or check."

As a Method of Advertising.

In paragraph IX of the complaint, at pages 33 and 34 of the record, it is alleged:

> "And plaintiffs are materially benefited because said articles in the customers' homes are a continuing advertisement for plaintiffs.
>
> That plaintiffs, and each of them, by use of the aforesaid premium advertising system, have been enabled at a moderate cost to greatly increase their business and profits, and especially their cash trade."

It has been a legitimate conception of the merchant who makes use of the premium coupon and redeems them in merchandise that the articles given by way of redemption constitute a powerful advertising medium.

From time immemorial it has been the task of retail merchants to retain the good will of their customers and induce a purchaser to return. A common method, as old as trade itself, to effect this has been to give to the customer a little more than he expects. Thus the "baker's dozen", or the "throwing in" of something with the goods actually sold, has come about. Presents have been given on certain holidays and the development of rest rooms, concerts, picture exhibitions, restaurants, porter service, free delivery, and other innumerable ad-

vantages offered by the modern store, all grew out of the idea of something more than the actual bargain for the purpose of retaining the old customer and bringing in the new.

Merchants in this day of greater efficiency learn to estimate how much they can afford to pay for the advantages of continued patronage, cash payment and increased business, and to form their estimates of how much they may expend in the various methods of advertising to effect these ends. They learn to estimate how much they may expend for advertising in newspapers, for advertising upon billboards, for electrical signs, etc., and likewise determine what proportion of their gross income they may return to the purchaser by way of discount. It would appear to be an undue hampering of the merchant and an improper curb upon his lawful enterprise to penalize him in the sum of $6,000 annually because he sees fit to expend a portion of his advertising appropriation in the method of premium coupons.

The Coupon System Furnishes a Peculiar Inducement for the Return of a Customer.

Following out the idea of securing the return of the purchaser, which it is not to be denied is an ambition lawful to be indulged by every retail merchant, it was found that the coupon system would serve this purpose.

If a purchaser of small articles found that at a particular store he secured a discount upon his smallest purchase and that account of this discount

would be kept by a coupon or stamp, such customer would naturally return for his subsequent purchases to the same store until the amount of his discount would reach a sensible amount in cash or would enable him to secure some particular article offered as a premium. Surely, if this be one of the incidents of the use of the coupons, it cannot be fairly said that it is in any way contrary to public policy.

Co-operation Among Merchants in the Use of the Premium System.

This method of keeping account of discounts and advertising by the coupon method having been adopted by various merchants, it was but natural that there should be evolved some plan of co-operation amongst those merchants who made use of the coupon; and if a plan were evolved which would make the premium tokens issued by different merchants interchangeable or redeemable in one general clearing house, this plan would manifestly add to the popularity of those stores which had availed themselves of it. Thus sprang up the Trading Stamp Company, which furnished the stamps and supplied the depot where the different articles were kept for redemption. We have previously discussed the possible intervention of such a concern, and have thought that we were able to demonstrate that such an intervention served nothing more than the convenience of the merchants and their patrons and involved no element contrary to public policy.

These remarks, descriptive of the general plan, the evolution and possibilities of the coupon system, are

believed necessary by reason of the enthusiastic statements in appellants' brief as to the possible evils of the system. With reference to such statements it is only fair to say that there is nothing disclosed in the record in this case to evidence the possibility of the imposition to which counsel refers. Until they have disclosed something in the practice of using premium tokens which evidences a possible extortion, imposition or wrong, peculiar to this particular practice as distinguished from other methods of advertising or inducing custom, no ground has been shown to justify the attempted classification.

As before remarked, the practice of giving discounts and the practice of advertising or attempting to induce custom by the giving of discounts, is, as the Court will judicially notice, common everywhere, and has been, we fancy, a general practice throughout the history of bargain and sale. All those who advertise to induce trade, or all those who offer a discount or premium for that purpose, are not selected for classification for this Act. There are selected only those who issue a stamp, coupon, or other device, to evidence such discount. This, we submit, is such an immaterial distinction as not to furnish a basis for classification.

Appellants propose the contention that, conceding the use of the premium token to be nothing more than a mere method of advertising, nevertheless the adoption of this particular method of advertising so differentiates us from merchants who have not chosen this method as to furnish a basis for classifi-

cation and the imposition of a regulative or revenue tax upon us.

That argument is specious which endeavors to justify a manifest prohibition in this manner.

It is true there is a difference between those who make use of the premium coupon and those who do not. There is likewise a distinction between those merchants who advertise in newspapers and those who advertise upon billboards; there is a distinction between those merchants upon the south side of the street and those who inhabit the north side; and a differentiation may be based upon innumerable other immaterial conditions and practices. These differences are not, however, in our view, sufficient to form a basis for discrimination. They do not correspond to the rule which is so clearly stated in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S., 150:

> "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

Nor with the statement in *Southern Ry. Co. v. Greene,* 216 U. S., 400, 417:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

Let us, at the risk of tediousness, carry the analysis further. The practice of giving a discount, or, in

other words, buying and selling at such price as the vendor and vendee shall agree upon, is not prohibited or attempted to be taxed. Indeed, it would hardly be contended that such a result could be accomplished with any observance of fundamental rights. A merchant may, therefore, offer to his customers a 4% discount from his list price for cash and remit that discount at the time the purchase is made; or, if he choose, keep an account of the items of discount to which his purchaser is entitled and settle with him later. If, however, he adopts the method of giving to the purchaser a token or ticket which will operate as a memorandum of the discount instead of keeping the memorandum upon his own books, he becomes liable to a tax of $6,000 per year. A merchant may, to induce the return of his customer, offer some article which the customer at his option may select in lieu of the cash discount; this article he may deliver himself or cause to be delivered at the time or subsequently; but if for his own or his customer's convenience he delivers a ticket or memorandum which will enable his customer to add them together and select later one of several articles offered him by the merchant, he must pay a prohibitive tax.

A merchant (as merchants commonly do at stated intervals) may advertise a special discount sale and attract customers by such advertisement, but if he advertises a uniform system of discount and permits his customer to keep track of such discount by memorandum slips or tickets which he gives him, he

must first pay a tax of $6,000 or be liable to imprisonment for one year.

A merchant may seek to induce custom by displaying advertisements in the newspapers or upon billboards, or otherwise, in which he sets forth the exceptionally low prices he is willing to accept for his goods. It could hardly be imagined such a practice would entitle the Legislature to discriminate between him and the merchant who does not see fit to do so. Yet, if he advertises a reduction of his prices as evidenced by coupons, he is chosen as a subject for extraordinary taxation. The analysis might well be pressed down to the point where it approaches the absurd, and yet it will be fair. It is a common practice of wholesale dealers to print upon the statements furnished their customers an offer of a certain percentage discount for cash payment or for payment within a certain period. Suppose, then, the purchaser by paying cash became entitled to his discount and chose to accept from the wholesaler other goods to the amount of such discount: we apprehend that it would not be contended that such wholesaler had violated the Act; yet, as a matter of fact, he would have fallen literally and exactly within its terms.

In *O'Keeffe v. City of Somerville* (Mass.), 76 N. E., 457, there was before the Court the question of the constitutionality of a statute imposing an excise tax on the business of selling or giving stamps, checks or coupons, in connection with the sale of

articles. It was held unconstitutional, the Court saying (p. 459):

> "We are therefore brought to the question whether the peculiar way of selling, to which the statute relates, involves a material difference in the nature of the business, such as to warrant the imposition of an excise tax on that account. The only difference referred to is the giving or delivering, as a part of the sale or in connection with it, of a stamp, or other similar device, which represents an additional right of property. Because this is entirely legitimate the attempt to tax it, as a peculiar kind of sale, is 'a discrimination founded upon an immaterial fact,' which renders such a statute invalid."

In the late case of *Van Deman & Lewis Co. et al. v. Rast et al.*, 214 Fed., 827, 833, the Court remarks:

> "Is there a just basis for the classification attempted in this section of the act? Merchants, etc., all pay a tax according to the value of the stock carried by each, but, if they sell goods for which coupons, etc., are given by themselves or others, then they must pay this additional tax for each place of business in each and every county in which said business is conducted or carried on. And, if goods are offered for sale with which coupons are given redeemable by persons other than the seller, then this tax must be paid by him for each of said lines of goods. We can see no just basis for such classification. It is an arbitrary selection of one merchant for the imposition of a 'greater burden' than that imposed on others in the same calling and condition."

In *City Council of Montgomery v. Kelly* (Ala.), 38 So., 67, 69, the Court gave expression to its views in the following language:

> "If it be allowed that an additional burden may be placed upon a merchant who chooses to advertise his business by offering a small gratuity to customers in the shape of these trading stamps, it would be equally lawful to place an extra burden on one who advertises his business in the papers, or one who offers, out of his own stock, a certain gratuity to every one purchasing goods to a certain amount, or one who erects a handsome sign in front of his store, etc. So long as his manner of conducting his business does not offend public morals, and work an injury to the public, it is his constitutional right to pursue, on terms equal to that allowed to others in like business, even though his methods may have a tendency to draw trade to him, to the detriment of competitors."

In *Ex parte McKenna* (Cal.), 58 Pac., 916, the Court, in holding invalid a license fee of $200 per quarter upon merchants who should issue stamps redeemable in money, merchandise or other things, said in the course of his opinion (p. 917):

> "To tax the smallest retail establishment eight times as much as the largest mercantile business, merely on account of its method of advertising or attracting customers, is clearly unreasonable."

In *Hewin v. City of Atlanta* (Ga.), 49 S. E., 765, the Court, after investigation of a plan similar in every way to the plan outlined in the bill here, says (p. 770):

> "In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade."

In discussing the character of the business, the Court of Appeals of Kentucky in *Commonwealth v. Gibson Co.* (Ky.), 101 S. W., 385, says:

> "A merchant, as a business proposition, might find it profitable to give a discount or rebate to persons who paid cash, withholding this advantage from those who purchased on credit. If a merchant advertised that he would sell for cash any article in his store at 4 per cent. less than the marked price, we cannot perceive any valid objection that could be urged to it, and it is plain that this practice would not violate either the letter or the spirit of the statute. Nor is there any substantial difference in the principle involved between selling an article at 4 per cent. under its marked price, and selling it at the marked price and giving to the purchaser a ticket or check representing the discount, with which ticket or check he can purchase an article in the store, the cost price of which is the same as the value of his ticket or check."

Tested, therefore, by the rules which have been commonly accepted, it would seem apparent that that merchant who gives a discount and issues coupons in evidence thereof does not by such conduct impose upon himself such a distinctive characteristic or so differentiate himself from other merchants as to entitle the State to classify him and impose upon him either a prohibitive or regulative tax.

If the Business or Practice is Lawful, it May not be Prohibited Indirectly by a License Tax.

The appellants have heretofore stoutly contended that it is within the power of the State Legislature to select for direct or license tax the merchant con-

ducting his business in the manner described; that if this right exists the judicial department may not prescribe a limitation upon the exercise of such a power. To uphold this doctrine reliance has been had upon announcements in the following cases:

Weston v. Charleston, 2 Peters, 449;
Union Pacific R. R. Co. v. Peniston, 18 Wallace, 5;
M'Culloch v. Maryland, 4 Wheat., 316;
Veazie Bank v. Fenno, 8 Wallace, 533;
Kirtland v. Hotchkiss, 10 Otto, 491;
Wiggins Ferry Co. v. St. Louis, 107 U. S., 365;
Spencer v. Merchant, 125 U. S., 345;
Kehrer v. Stewart, 197 U. S., 60;
Flint v. Stone Tracy Co., 220 U. S., 107;
Postal Telegraph Cable Co. v. Charleston, 153 U. S., 692;
McCray v. United States, 195 U. S., 27.

Our previous argument has not carried to the point for which it has been designed if it has failed to demonstrate that the merchant who makes use of a premium token may not be singled out and discriminated against by any character of taxation. However, if it should be held that this mere incident of his business, viz., the issuing of premium tokens to evidence his discount, so differentiates him from merchants who do not use this token that he becomes the subject of a special regulative or revenue tax, that tax may not be carried to the point of prohibition.

Taken nakedly, there are statements in the course of the opinions in the cases last above referred to which would seem to furnish warrant for the con-

tention that once the power to tax or regulate is granted, there is no limit to the extent of that power and that it may be extended well to the point of prohibition. To rely upon these expressions without reference to their context, or the matter actually decided, will lead to confusion.

The argument is a fallacy, and a careful examination of the decisions of this Court will demonstrate that a prohibitive tax has been sustained in but two instances: In *Veazie Bank v. Fenno,* 8 Wallace, 533, and in *McCray v. United States,* 195 U. S., 27. *In each of these instances the subject of the tax was something which might have been directly prohibited.* The distinction is made plain in the *McCray* case, where it is said (p. 64):

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that *the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.*" (Italics ours.)

In the *Veazie* case this Court considered the constitutionality of an act levying a tax on the amount of notes of a state bank, it being contended that such tax was so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank. The power of the Federal Government granted by the Constitution to provide a system of currency was adverted to, and it was held to follow from the granting of this power, and for the purpose of its proper exercise, Congress might place such restrictions as it chose upon other currency not issued by its authority. This, of course, would carry with it the power to prohibit. The Court says (8 Wallace, 549):

> "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempt to secure a sound and uniform currency for the country must be futile."

A reliance upon the statement of Chief Justice Marshall, that "the power to tax is the power to destroy," is responsible for the fallacy of appellants' argument in this regard. Mr. Morawetz in an article (see 26 Harvard Law Review, p. 682) comments

upon the misapplication of this famous statement, as follows:

> "It has been asserted that a legislature may use its taxing power not only as a means of raising revenue, but also as a means of securing by indirection results which the legislature could not constitutionally attain by direct legislation; and in support of this assertion reference has been made to the *dictum* of Chief Justice Marshall that 'the power to tax involves the power to destroy.' This *dictum,* like other striking phrases of that great jurist, has sometimes been quoted without reference to its context and in support of doctrines which it does not justify. The statement that 'the power to tax involves the power to destroy' was made in support of the conclusion that a state could *not* tax the operations of an instrument of the national government and thus control its constitutional measures; but Chief Justice Marshall certainly did not mean to imply that the taxing power could constitutionally be used as a pretext for the accomplishment of an unconstitutional object. That this was not his meaning is apparent from his statement in the same case that 'should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' Undoubtedly, the courts would not be justified in scrutinizing the reasonableness of a tax or the wisdom or motive of Congress in imposing it; but if it should appear plainly that a law nominally imposing a tax was not really a revenue measure, but in fact was an act of confiscation, or a mere pretext for the accomplishment of some purpose not warranted by the Constitution, the Supreme Court could

not sustain such a law without abdicating its highest function and permitting the practical nullification of the Constitution itself."

A careful analysis of all the authorities will compel the conclusion that license taxes may be imposed only under one of the following rules:

1. A license tax may be levied upon any business or occupation for revenue purposes, in which case the Court will not inquire as to the propriety of the amount thereof.

This right, however, is subject to the following qualifications:

(a) *The tax must not be prohibitive.*

"The grant of authority to impose fees for the purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose."

Cooley on Taxation (3rd Ed.), p. 1140.

(b) *It must not be discriminative.*

"Let it [the license tax] reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible."

Cooley on Taxation (3rd Ed.), p. 260.

(c) *Any attempted classification for the collection of revenue or for regulation must be upon some sound basis.*

"The difficulty is not met by saying that, generally speaking, the State when enacting

laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a *reasonable* and *just relation* to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." (Italics ours.)

Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 560.

2. A license tax may be levied upon a lawful business or occupation for regulative purposes.

This rule, however, is limited as follows:

(a) It must not be discriminative within the class at which it is aimed.

(b) Within broad discretion there must be a sound reason for the regulation.

"When the license is for regulation merely, the limitation is one of discretion and policy, and the question presented is, whether the business or occupation is one rendering special regulation important for any purpose of protection to the public, or to guard individuals against fraud and impositions."

Cooley on Taxation (3rd Ed.), p. 1143.

(c) The exaction must bear a relation to the cost of regulation.

"Where the exaction is imposed under the power to regulate or in the exercise of the police power, as distinguished from the power to tax for revenue, as heretofore explained, the general rule obtains that the *sum levied cannot be excessive or more than reasonably neces-*

sary to cover the costs of granting the license and proper police regulation."

McQuillin on Municipal Corporations, Vol. III., §1002.

3. There is an unfavored class of business or occupation which may be prohibited altogether without violation of natural rights, and as against this class the tax may be prohibitive.

Within this class are dealers in intoxicating liquors, prostitutes, dance halls, hawkers, lotteries, fortune-tellers, auctioneers upon the streets, and various privileges which do not rest upon fundamental right but which only exist by virtue of special grant from the sovereign. As to any of these the Legislature may prohibit, and, therefore, may accomplish the same result by taxation.

If we measure the exaction in question by these rules, it is apparent it must fall. It cannot be sustained as a revenue measure, (1) because it is prohibitive and has been so declared by the Supreme Court of the State; and (2) because it lacks the necessary element of uniformity, inasmuch as it singles out one of a class of merchants who give discounts.

It cannot be upheld as a regulative measure, (1) because it is discriminative; (2) because the practice aimed at bears no real relation to the public morals, safety or welfare; and (3) because the exaction vastly exceeds any possible cost of regulation.

It cannot be upheld as falling within the third class as a tax upon unfavored practices, for the

reasons we have hereinbefore set forth. We, therefore, conclude that it cannot be upheld either as a revenue measure or a license tax.

Decisions by Other Courts.

It is quite unlikely that there has ever been presented to this Court a case where it has been asked to reject as wrong a conclusion so generally adopted by other judicial tribunals. Asserting nothing for these decisions by way of binding force upon this Court, we suggest a reference to them only because of the persuasiveness of the reasoning they contain. For convenience we insert them, classifying as follows:

In the following cases statutes or ordinances imposing a license fee or tax on merchants using trading stamps were held unconstitutional:

Little et al. v. Tanner, 208 Fed., 605;
Van Deman & Lewis Co. et al. v. Rast et al., 214 Fed., 827;
City Council of Montgomery v. Kelly, 142 Ala., 552, 38 So., 67;
Ex parte McKenna, 126 Cal., 429, 58 Pac., 916;
Hewin et al. v. City of Atlanta, 121 Ga., 723, 49 S. E., 765;
Commonwealth v. Gibson Co., 125 Ky., 440, 101 S. W., 385;
O'Keeffe v. City of Somerville, 190 Mass., 110, 76 N. E., 457;
International Trading Stamp Co. v. City of Memphis, 101 Tenn., 181, 47 S. W., 136;
Ex parte Hutchinson, 137 Fed., 949;
Sperry & Hutchinson Co. v. Tacoma, 68 Wash., 254, 190 Fed., 682.

There are other decisions of State and Federal Courts which are not reported, for which reason we make no reference to them.

The following cases hold unconstitutional laws regulating the issuance and redemption of trading stamps:

State v. Caspare, 115 Md., 7, 80 Atl., 606;
State v. Sperry-Hutchinson Co., 110 Minn., 378, 126 N. W., 120;
Kanne v. Segerstrom Piano Mfg. Co., 137 N. W., 170.

The following cases have declared unconstitutional or invalid statutes or ordinances prohibiting the giving of trading stamps:

State v. Shugart, 138 Ala., 86, 35 So., 28;
Ex parte Drexel and Holland, 147 Cal., 763, 82 Pac., 429;
City & County of Denver v. Frueauff, 39 Colo., 20, 88 Pac., 389;
Ter. of Hawaii v. Gunst, 18 Haw. Rep., 196;
State v. Walker, 105 La., 492 (1901), 29 So., 973;
State v. Caspare, 115 Md., 7, 80 Atl., 606 (1911);
Long v. State, 74 Md., 565 (1891), 22 Atl., 4;
State v. Sperry-Hutchinson Co., 110 Minn., 378, 126 N. W., 120;
State v. Ramseyer, 73 N. H., 31 (1904), 58 Atl., 958;
People v. Gillson, 109 N. Y., 389, 17 N. E., 343;
State v. Dalton, 22 R. I., 77, 46 Atl., 234;
Young v. Commonwealth, 101 Va., 853 (1903), 45 S. E., 327;
State v. Dodge, 76 Vt., 197 (1904), 56 Atl., 983;
Leonard v. Bassindale, 46 Wash., 301 (1907), 89 Pac., 879.

In the following cases statutes or ordinances taxing trading stamp companies were held unconstitutional:

City Council of Montgomery v. Kelly, 142 Ala., 552, 38 So., 67;
Humes v. City of Little Rock, 138 Fed., 929;
Sperry & Hutchinson Co. v Owensboro (Ky.), 151 S. W., 932;
City of Winston v. Beeson, 135 N. C., 271, 47 S. E., 457;
Ex parte Hutchinson, 137 Fed., 950;
International Trading Stamp Co. v. City of Memphis, 101 Tenn., 181, 47 S. W., 136;
Ex parte Hutchinson, 137 Fed., 949.

In the following cases it was specifically decided that the trading stamp business is not a "gift enterprise" or a scheme in the nature of a lottery, and that "gift enterprises" are illegal only when they are lotteries:

State v. Shugart, 138 Ala., 86, 35 So., 28;
Humes v. City of Little Rock, 138 Fed., 929;
Ex parte McKenna, 126 Cal., 429, 58 Pac., 916;
City & County of Denver v. Frucauff, 39 Colo., 20, 88 Pac., 389;
Dist. of Col. v. Gregory, 219 U. S., 210;
Ter. of Hawaii v. Gunst, 18 Hawaii Rep., 196;
Long v. State, 74 Md., 565, 22 Atl., 4;
State v. Caspare, 115 Md., 7, 80 Atl., 606;
Commonwealth v. Emerson, 165 Mass., 146, 42 N. E., 559;
Commonwealth v. Sisson, 178 Mass., 578, 60 N. E., 385;
O'Keeffe v. City of Somerville, 190 Mass., 110, 76 N. E., 457;
Sperry & Hutchinson Co. v. Temple, 137 Fed., 992;

State v. Sperry-Hutchinson Co., 110 Minn., 378, 126 N. W., 120;
People v. Dycker, 76 N. Y. S., 111;
People v. Gillson, 109 N. Y., 389, 17 N. E., 343;
People v. Zimmerman, 92 N. Y. S., 497;
City of Winston v. Beeson, 135 N. C., 271, 47 S. E., 457;
State v. Dalton, 22 R. I., 77, 46 Atl., 234;
Young v. Commonwealth, 101 Va., 853, 45 S. E., 327.

In the following cases it was expressly held that state prohibition of the trading stamp business is in violation of the XIVth Amendment to the United States Constitution:

City Council of Montgomery v. Kelly, 142 Ala., 552, 38 So., 67;
Ex parte Drexel and Holland, 147 Cal., 763, 82 Pac., 429;
State v. Ramseyer, 73 N. H., 31, 58 Atl., 958;
People v. Gillson, 109 N. Y., 389, 17 N. E., 343;
Ex parte Hutchinson, 137 Fed., 950;
State v. Dalton, 22 R. I., 77, 46 Atl., 234;
Young v. Commonwealth, 101 Va., 853, 45 S. E., 327;
State v. Dodge, 76 Vt., 197, 56 Atl., 983;
Leonard v. Bassindale, 46 Wash., 301, 89 Pac., 879;
Ex parte Hutchinson, 137 Fed., 949.

As against this mass of authority is cited:

Humes v. Ft. Smith (Ark.), 93 Fed., 857;
Lansburgh v. Dist. of Col., 11 App. D. C., 512;
Dist. of Col. v. Kraft, 35 App. D. C., 253 (following the *Lansburgh* case);
Sperry & Hutchinson Co. v. Tacoma, 68 Wash., 254, 190 Fed., 682;

Sperry & Hutchinson Co. v. Blue, 202 Fed., 82;
State v. Pitney, 79 Wash., 608, 140 Pac., 918.

The case of *Humes v. Ft. Smith* (Ark.), 93 Fed., 857, loses its force as a precedent, because it relates solely to concerns engaged in the business of selling trading stamps. It will readily occur to the Court that there is a clear distinction between the business of selling trading stamps or coupons and the business in which these appellees are engaged, where the coupon is used as a mere incident. With some degree of fairness, it might be held that the Legislature could select for special regulation by taxation all those engaged in the trading stamp business, but it would by no means follow that it might classify or select for taxation certain merchants merely because they made use of the coupon.

The case of *Humes v. City of Little Rock,* 138 Fed., 929, later decided by the same Court though by a different judge, will certainly be held to overrule the former case if it be at all in point.

In the *Lansburgh* case (11 App. D. C., 512) and the *Kraft* case (35 App. D. C., 253) from the District of Columbia and in *Sperry & Hutchinson Co. v. Blue* (202 Fed., 82), the party complaining was likewise engaged in the *trading stamp business.*

It is, therefore, clear that the Supreme Court of the State of Washington stands alone as authority for the contention which the appellants are making. This Court will, of course, have due regard for the announcements of other judicial tribunals; but it is

suggested, with the utmost deference, that any regard which this Court may have for the decision of the Supreme Court of the State of Washington in the *Pitney* case (140 Pac., 918) will be greatly diminished in view of that Court's previous announcement in the *Bassindale* case (89 Pac., 879).

The opinion of that Court in the *Pitney* case may not be read without reaching the conclusion that those members of the Court who signed the opinion either relied upon what some have been pleased to call "*the modern trend of constitutional interpretation,*" or, in view of repeated attempts at legislation, believed it expedient to foreclose future agitation by inviting the decision of this the final tribunal. This "modern trend,"—if by that is meant a departure from the rules of constitutional law which have been for more than a century adhered to by this Court—we have been unable to discover from a reading of its decisions. From time to time new enterprises and changed conditions have, especially within the last decade, called for an application of those principles which had never been previously made; but we have found no decision of this tribunal which convinces us that constitutional barriers have been so far thrown down as to permit such an invasion of fundamental rights.

Repeated Attempts to Enact Such Legislation Offer No Argument for its Constitutionality.

It has been urgently contended by counsel that repeated attempts of different legislative assemblies to re-enact a law of the character of that complained

of affords a demonstration that there is behind such law not an ill-considered or sporadic impulse but a sound public sentiment, and that this may be taken as evidence of an expression of the will of the people generally—that the public welfare demands such legislation. This view appears to have been approved by the Supreme Court of the State of Washington in the *Pitney* case (140 Pac., 918). While it is a character of argument which we would hardly look to see adopted by a court which retains a fair realization of its function as an independent department of the Government to uphold the Constitution, it is not lacking in plausibility.

The answer to the contention suggested is, that a method has been provided by fundamental law for the amendment of constitutions or the abrogation of their specific provisions, and repeated enactments of the Legislature in the face of constitutional inhibition is not specified as one of those methods.

While due regard must be given by the Courts to the expression of popular will by the people through their representatives, and while the enactment into law of this will so expressed is not to be opposed by the Courts, except there is a clear infringement upon rights guaranteed by the Constitution, nevertheless the duty of the Court in this regard is just as clear today as it was when defined by the great Chief Justice in *Marbury v. Madison*, 1 Cranch, 137 (U. S.). And it is with the utmost deference suggested, that this duty never becomes the less

absolute by the persistence of the legislative department. That Court is measurably confessing its impotence which is willing to abdicate its function so far as to yield to repeated legislative assaults upon the rule which it has established in applying the fundamental law. A lively regard for the conceded power and duty of the Courts under our system would lead one to believe that the persistence of the Legislature referred to in the *Pitney* case (140 Pac., 918) would invite a rebuke rather than a complaisant yielding.

We had believed it to be legitimate argument to invoke the attention of the Court to the many instances in which attempted legislation in this very regard had been held by the Courts to be unconstitutional. It was our belief that the unanimity and well-considered character of these decisions would tend to induce another Court to reach the same conclusion; but we find the citation of these instances turned against us and used to demonstrate a popular desire for such legislation. This cannot be legitimate argument. It surely did not occur to this Court when the case of *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S., 150, was decided. In that case the Court had before it the validity of an act of the Legislature attempting to select railway companies and penalize them for a failure to pay claims promptly. Mr. Justice Brewer in the course of his opinion refers to a long list of cases where legislation of a like character was held unconstitutional in many different states, and these decisions

were used to fortify the conclusion reached in the opinion. Other analogous instances might well be cited of the same method of reasoning. We must retain confidence, therefore, that we have not weakened our contention by repeating our reference to the many instances where that contention has been sustained by other Courts.

We may assert our belief in the principle, that the will of the people as expressed by its representatives should be supreme; but an adherence to this belief should not prevent a consideration of this question with that candor which will enable us to account for the persistency of the legislative bodies, —not as a desire to express the public will in a matter of *public concern*, but as a ready willingness to yield to those who are interested in having suppressed such business as that conducted by the plaintiffs. That such results might not be accomplished, and that those engaged in a lawful business and enjoying the liberty which is guaranteed them might not be trod under the heel of competitors, rivals or enemies, if such chance to be in the majority, is the very purpose of our constitutions.

It was well said by the Court in *Chaddock v. Day* (Mich.), 13 Am. St. Rep., 468, 471:

> "It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government — national, state, or municipal — to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when in-

dulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts, and be only upheld when it is strictly within the legitimate power of Congress, or the state or municipal legislatures."

The "Retail Market Price" Provision in the Act Renders it Unconstitutional.

A perusal of the Act will disclose that it contains a provision making impossible its observance with certainty. It provides:

> "Every person, firm or corporation who shall use * * * in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same * * * to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge *or for less than the retail market price thereof* * * * shall before so * * * using the same obtain a separate license, etc." (Italics ours.)

A penalty equal to the penalty imposed for some of the most heinous offenses defined by our statutes is thereby put upon a merchant who shall issue any certificate or token which shall entitle one to receive from him goods "*for less than the retail market price thereof.*" This, we submit, is impossible of ascertainment.

The Court will judicially notice a practice common amongst merchants of giving to certain of their customers a memorandum or credit slip entitling the customer to the delivery of goods in the future. This is not attempted to be inhibited by the Act, nor might it well be contended that it could be; but if such memorandum shall, either upon its face or in the consummation of the transaction, entitle the customer to receive any goods for less than the market price, there is a direct violation of the Act. The variability and elusory character of this term requires no comment. The retail market price of an article may be one thing upon one day and another upon the next. It may be one thing at a store in one portion of the city and different in another. It would be absurd to suggest that the merchant, prior to delivering to his customer goods in exchange for a memorandum which he had previously issued, must make full investigation against possible fluctuations, and thus determine at his peril, with exactness, the market price of the particular commodity at the moment when delivery is made. It would seem clear that to submit one to a peril so incapable of definition would be to deprive him of due process.

The principle of *International Harvester Co. v. Kentucky*, 234 U. S., 216, and *Collins v. Commonwealth* (Ky.), 34 Sp. Ct. Rep., 924, would seem to be controlling. In the former case you held that inasmuch as a combination of the character complained of in that case was violative of the law only

in the event that its effect should be to fix a price that was greater or less than the real value of the article, the determination of the "real value" being impossible, rendered invalid a conviction under said Act.

In the latter case you say:

> "He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition."

It goes without saying, that the term "retail market price" is no less elusory than the term "real value."

Either because it doubted its power to prohibit absolutely the practice of a lawful custom or because of its reluctance to interfere with merchants to whom it designed to extend its favor, the Legislature did not attempt to prohibit entirely the giving by a merchant of a certificate entitling the customer to goods, but only attempted to make this practice unlawful in the event such goods should be delivered for less than their market price, thus imposing the duty of an exact ascertainment in each instance of that price. A statute so indefinite is incapable of enforcement, and therefore void.

It is said in *Bishop on Statutory Crimes* (2nd Ed.), § 41:

> "Where the statutory terms are of such uncertain meaning, or so confused, that the courts

cannot discern with reasonable certainty what is intended, they will pronounce the enactment void."

See, also,—

2 *Lewis' Sutherland Statutory Construction* (2nd Ed.), § 520.

In *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed., 866, 876, Judge Brewer says:

> "For no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 672, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, *U. S. v. Sharp*, Pet. C. C. 122; *The Enterprise*, 1 Paine, 34; Bish. St. Cr. § 41; Lieb. Herm. 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

See, also, the announcement of the same judge in *Tozer v. United States* (Mo.), 52 Fed., 917, 918.

In *Cook v. State*, 59 N. E., 489, the Appellate Court of Indiana passed upon an act attempting to define a crime in the use under certain conditions of

narrow-tired wagons. The Court says (pp. 490, 491):

> "There must be some certain standard by which to determine whether an act is a crime or not; otherwise, cases in all respects similar, tried before different juries, might rightly be decided differently, and a person might properly be convicted in one county for hauling over a turnpike in that county, and acquitted in an adjoining county of a charge of hauling the same load, on the same wagon, over a turnpike in like condition in the latter county, because of the difference of conclusions of different judges and juries based upon their individual views of what should be the standard of comparison of tires, derived from their varying experiences, or the opinions of witnesses as to what difference of width of tires would constitute one wagon a narrow-tired wagon and another a broad-tired wagon. *If it should be said that the question as to what is a narrow-tired wagon is one which may be determined in a particular case by the jury trying it, under proper instructions from the court, can we hold that the court in its instructions could lay down any principle or rule which would obtain in all such cases throughout the state? If so, can this court indicate what should be the scope or tenor of such instructions?*" (Italics ours.)

In *Brown v. State*, 119 N. W., 338, 339, the Supreme Court of Wisconsin says:

> "It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make

criminal. *One cannot be said to willfully violate a statute which is so contradictory or blind that he must guess or conjecture what is his duty thereunder.* * * * The solution of such conundrums cannot be imposed upon individuals at the risk of criminality if they make a mistake." (Italics ours.)

In *Louisville & Nashville R. R. Co. v. Commonwealth* (Ky.), 33 L. R. A., 209, in holding unconstitutional an act which imposed a penalty upon a carrier for charging more than "just and reasonable compensation," the Court says (pp. 211, 212):

> "And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

To the same effect are—

Matthews v. Murphy, 23 Ky. Law Rep., 750, 63 S. W., 785;
Kilbourne v. State, 84 Ohio, 247, 95 N. E., 824;
Buckles v. State, 5 Okla., 109, 113 Pac., 244;
Savage v. Wallace, 165 Ala., 572, 51 So., 605.

No stronger demonstration could be had of the difficulty which is bound to be encountered when the Legislature attempts to single out for oppression some particular class and has no basis for the discrimination other than an artificial distinction. To

have attempted to prohibit the giving of any memorandum or token which might be accepted by the merchant in exchange for goods might have resulted in an interference with those merchants whom the Legislature did not desire to embarrass. In order, therefore, to reach only such merchant as made use of the premium token, as it is generally used, they made the distinction to depend upon something which is incapable of determination, and thus carried into the Act a clause which makes it impossible of enforcement without an invasion of the right guaranteed by the Constitution.

The Act is Invalid Because its Observance will Require the Removal of Inserts, and Consequent Destruction of our Property.

Having in mind the distinction between the rights accorded to us by the Federal Constitution and laws as citizens of the United States and those guaranteed to us under the XIVth Amendment as citizens of a state, we contend that the bill discloses that its necessary operation is to deprive us of a privilege secured to us as citizens of the United States.

It is alleged in effect in the bill (see Record, p. 33) that there is enclosed in unbroken packages of tobacco and tobacco products, in which the plaintiffs deal, certificates and premium tokens. The insertion of such tokens in such tobacco packages and their sale with such insertion is expressly authorized by the laws of the United States.

By Sec. 3394 of the Revised Statutes, as amended by Sec. 10 of the Act of July 24, 1897, as further

amended by Sec. 2 of the Act of July 1, 1902, Congress, in the exercise of its acknowledged powers, made lawful the insertion in tobacco packages of any premium, token or insert which did not relate to a lottery or was not of an indecent or immoral nature. The question of the authority of Congress to so enact is settled by *Felsenheld v. United States,* 186 U. S., 126, where the Court says (p. 132):

> "In the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable."

It is not contended that the State might not by appropriate legislation regulate or prohibit the sale of these tobacco products, and might for that purpose impose upon the sale conditions *in addition* to those prescribed by Congress. But this is another and a different proposition from the levy of a prohibitory tax upon the sale of such articles merely because the package in which they are enclosed contains an insert *legalized by Congress,* no such tax being levied upon the *precise goods when the insert is lacking.* In other words, to accomplish the sale of such goods within the State of Washington without the payment of a prohibitive tax, there must be first removed therefrom an insert legalized by the paramount law. This is contrary to the principles announced in—

M'Culloch v. Maryland, 4 Wheat., 316;
Sinnot v. Commissioners of Pilotage of Mobile, 22 Howard, 227;

Smith v. Alabama, 124 U. S., 465;
Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S., 613;
Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426;
Asbell v. Kansas, 209 U. S., 251;
Northern Pacific Ry. Co. v. Washington, 222 U. S., 370;
Southern Ry. Co. v. Reid, 222 U. S., 424;
Second Employers' Liability Cases, 223 U. S., 1;
Savage v. Jones, 225 U. S., 501;
Bettman v. Warwick, 108 Fed., 46.

But the principle seems to have been applied—with a directness which this case cannot escape—in *McDermott v. Wisconsin*, 228 U. S., 115. In that case, Congress, in the exercise of its general power over Interstate Commerce, had passed the Pure Food Law, by which was prohibited the *misbranding* of foods shipped interstate. By a departmental ruling, it had been determined that a food product labeled "corn syrup with cane flavor" was a proper branding. The right of the department to so determine was conceded. A shipment arrived in the State of Wisconsin labeled in accordance with the ruling of the department. Complaint was made in Wisconsin that the labeling did not accord with the law of that state, but that the article must be labeled "glucose flavored with refiner's syrup," and that the package, in order to be sold in the State of Wisconsin, must be so labeled and bear no other label. Thus, the Wisconsin law would require the *removal of the label* made lawful by the Federal law. This Court, in its opinion, did not doubt the authority

of Wisconsin to impose within that state requirements for the sale of such products *in addition* to those required by the Federal Act, but held, nevertheless, that the State lacked the power to prescribe a rule of sale which would frustrate the operation of the national law. The Court says (p. 133):

> "While in this situation, *the goods being unsold,* as a condition of their legitimate sale within the State, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the State law *and none other.* * * * *In other words, it is essential to a legal exercise of possession of and traffic in such goods under the State law that labels which presumably meet with the requirements of the Federal law* * * * *shall be removed from the packages before the first sale by the importers.* * * * Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, *we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations* * * * , to destroy rights arising out of the Federal statute * * * , *and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress* * * * ." (Italics ours.)

The application of this decision to the present case would seem plain. Under the exercise of its undoubted authority, Congress legalized the coming into the State of Washington of the tobacco packages containing the inserts described. Once in the

State of Washington, such inserts, so legalized, must be removed before sale. The conflict is clear, and the State legislation, therefore, deprives us of our privileges and immunities as citizens of the United States.

Regardless, however, of our rights as citizens of the United States, under the laws of the United States authorizing tobacco inserts, the necessary operation of the Act is to deprive us of our property without due process in another regard. It is alleged (see Record, p. 33) that we have upon our shelves packages containing various articles—such as soap, flour, tea, coffee and starch, in which are inserted such tokens. These tokens, being enclosed, may not be removed without the virtual destruction of the package. These packages having been secured and placed in our stock when the sale thereof was lawful, it is contended that no legislation may now deprive us of the use of this property. *People v. Van De Carr,* 178 N. Y., 425, 70 N. E., 965, *People v. Zimmerman,* 92 N. Y. S., 497, and the reasoning of *Commonwealth v. Sherman Mfg. Co.* (Mass), 75 N. E., 71, sustain this contention.

There is a clear distinction between this case and that of *Mugler v. Kansas,* 123 U. S., 623. In that case it was held that there was no deprivation of due process in the destruction of intoxicating liquors and property involved in the sale thereof under the authority of a state enactment. As it was well reasoned in that case, this property had been secured and devoted to its purpose with a full realization of

the fact that the public safety may be endangered by the use of intoxicating liquors and that it would, therefore, at any time be well within the police power of the State to inhibit the traffic. The owners, therefore, secured this property subject to adverse action which might be taken at any time by the State, and they had a right reasonably to anticipate that its value might be destroyed.

There are also elements in our case which distinguish it from *Halter v. Nebraska*, 205 U. S., 34, if it may be said—which is by no means apparent from the opinion—that this case is authority for the conclusion that the Act in question operated to authorize the destruction of articles bearing the national emblem. As was said in the *Halter* case, no one had a right to conceive that he had a vested right in the use of a national emblem for advertising purposes.

Upon the contrary, the plaintiffs, in the State of Washington, had a right to assume that they could acquire such quantities of merchandise as they desired in packages containing premium tokens and dispose of the same without let or interference by the State Government. They were not required to rely upon what they believed to be the proper construction and application of the Constitution, nor upon the adjudications of the Courts of other states holding that legislation prohibiting such a practice was invalid. Their own supreme tribunal had, in the *Bassindale* case (89 Pac., 879), so interpreted the local Constitution as to make such traffic secure.

By giving such interpretation to the Constitution the sovereign authority had invited the acquisition of this property by the plaintiffs. It was acquired not in reliance upon the passivity of future legislative assembly, which might neglect to inhibit something which was known to be well within its power to inhibit, as in the *Mugler* and *Halter* cases, but in reliance upon a decision by the court of last resort that it never could be prohibited by the Legislature of the state into which the property was brought. By a complete change in this interpretation the holding or disposal of this property within the State is made unlawful. This, we submit, is a deprivation without due process.

The Act is Unconstitutional Because of the Excessive Penalty Provided.

The Act in question provides that "any person, firm or corporation violating any of the provisions shall be guilty of a *gross misdemeanor.*" It is clear that if the Act is valid each delivery of a certificate or token would constitute a separate offense. The penalty of a gross misdemeanor is defined by the statutes of Washington (Remington & Ballinger's Annotated Codes & Statutes of Washington §2267), as follows:

> "Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both."

It is not unjustifiable if one instinctively criticize an enactment which provides such an enormous penalty for the commission of an act in which there is nothing inherently or morally vicious and which may not be considered wrongful save for some fancied reason which impelled the Legislature to forbid it. It is difficult to escape the conclusion that this penalty, so disproportionate to the character of the newly created offense, was purposely imposed with the idea of deterring a resort to the courts to test its constitutionality. Knowing that such legislation had been repeatedly declared unconstitutional by various courts, relying upon the decision of the Supreme Court of the State of Washington in the *Bassindale* case (89 Pac., 879) holding such legislation to be unconstitutional, feeling instinctively that the natural rights secured us by the Constitution had been invaded, we have seen fit to attack the Act in this proceeding; but we have not done so without an appreciation of the enormous risk we have been taking by conducting our business, as under prior decisions we had the right to conduct it, while we should test the validity of the Act. We had left us one of three courses: We could submit at once to the impossible exaction of the Act; we could cease to carry on our business and surrender our liberty of action; or, at such a tremendous peril, appeal to the courts. To impose such a peril upon us is a denial of due process of law. We believe we fall directly within the adjudications of this Court.

In *Cotting v. Kansas City Stock Yards Co.*, 183

U. S., 79, 100, Mr. Justice Brewer speaks with emphasis to the subject:

> "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss?
> * * * * * * *
> But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

If it may be said that the *Cotting* case went off upon another point, it was squarely decided in *Ex parte Young*, 209 U. S., 123. In that case you say (p. 147):

> "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and it officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

We are not unmindful of the distinction this Court has drawn in such cases as *Southwestern Oil Co. v. Texas*, 217 U. S., 114, *Grenada Lbr. Co. v. Mississippi*, 217 U. S., 433, and *United States v. Delaware & Hudson Co.*, 213 U. S., 366, and others, where (*a*) no penalties are sought to be recovered,

or (*b*) where the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the Act, and, therefore, may be left to be determined should an effort to enforce the penalties be made.

We have alleged that the defendant officers are threatening to bring a multitude of criminal prosecutions, as well as civil suits, to enforce the payment of said license tax (see Record, p. 37). The imposition of the gross penalties and the collection of the enormous tax is, therefore, directly involved in the issue of the present action and depends entirely upon whether or not the injunctive decree which now restrains the officers shall be sustained. The clause imposing the penalty is not separable from the remainder of the controversy because it stands alleged that we risk the imposition of the penalty in the event the Act is held to be constitutional. We are not able to distinguish the case from the *Cotting* case (183 U. S., 79) or the later case of *Missouri Pacific Ry. Co. v. Tucker,* 230 U. S., 340.

If the distinction is attempted to be made, which is referred to in *Ex parte Young* (209 U. S., 123), that there is a difference between a case where the validity of the act depends upon the existence of a fact which can be determined only by an investigation of a very complicated and technical character and the ordinary state of a statute upon a subject requiring no such investigation, we have only to refer to that portion of the Act to which we have heretofore adverted which forbids that we should redeem

our tokens in goods at less than the "*retail market price.*" Surely, the investigation of this fact which would determine whether or not we had violated the law would be as laborious and uncertain as an investigation into the reasonable character of freight rates, as in the *Young* case. Again, it may be suggested, if the appellants still seriously contend that the Act is not to be taken as conclusively prohibitive, that the investigation into the question of its prohibitive character with regard to any particular business would be equally as involved.

Our fancy might be well engaged with the spectacle of a citizen, who has given out a memorandum or token to a customer entitling him to the delivery of goods in the future, addressing himself to an investigation of the occult problem of the retail market price of a commodity upon a certain day and bound to reach a correct ascertainment in peril of imprisonment for one year or the exaction of a fine of $1,000. One instinctively concludes that the imposition of such a task, at the risk of such a heavy penalty, is an invasion of fundamental rights. The Courts have repeatedly reached the same conclusion upon analogous questions.

See—

Waters-Pierce Oil Co. v. Texas, 212 U. S., 111;
Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362;
Consolidated Gas Co. v. City of New York (N. Y.), 157 Fed., 849;
Portland Ry., L. & P. Co. v. Portland, 201 Fed., 119;

Bonnett v. Vallier (Wis.), 116 N. W., 885; *State v. Crawford*, 74 Wash., 248, 133 Pac., 590.

The Lansburgh and Kraft Cases.

Reliance has been placed by those who advocate the validity of such legislation upon the case of *Lansburgh v. Dist. of Columbia*, 11 App. D. C., 512, and *Dist. of Columbia v. Kraft*, 35 App. D. C., 253, 30 L. R. A. (N. S.), 957. The latter case is bottomed upon the former, and reference seems to be made to these cases principally because of certain intemperate language to be found therein, because the cases are not in point upon principle.

In the *Lansburgh* case the statute of the district which had been violated was one forbidding a "gift enterprise" after such an enterprise had been defined as follows:

> "Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise."

The representative of a "trading stamp company" had made a contract, which is set out in full in the

opinion, for the delivery of trading stamps to a merchant. The contract contained certain provisions which the Court found to be exceptionable. The Court narrowed the meaning of the statute so as to exclude the individual or concern which exercised the natural right of making a gift for the purpose of inducing custom, or otherwise, and, having so limited the statute, applied it to the contract which was in issue. Grave doubt might well be entertained of the power to limit by construction a statute which is manifestly plain, in order to bring within its terms a certain class, under the authority of *United States v. Reese,* 92 U. S., 214, *Trade-Mark Cases,* 100 U. S., 82, *United States v. Harris,* 106 U. S., 629, and *Baldwin v. Franks,* 120 U. S., 678.

The Court then says (p. 528):

> "We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business, or to determine just what character of inducements by way of gift or premium may, and may not, be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain; *and the exercise of such power would doubtless be denied if expressly attempted.* * * * It is possible also that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, *not attended with any element of*

chance, and where the gift is not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic." (Italics ours.)

It is bound to be remarked that the Court is required to read into the statute a limitation not found there in order to so narrow its application.

The Court then proceeds to set forth the elements of the contract which constitute it a gift enterprise and make it subject to prohibition, as follows (pp. 531, 532):

"The stamps are sold at the rate of fifty cents per hundred to the contracting merchants, and yet purport to be redeemable with premium gifts at the assumed value of one dollar per hundred. Unless, therefore, the so-called premiums to be distributed among the diligent collectors of stamps are grossly overvalued, the scheme can not maintain itself, for in addition to the actual cost of the premiums it has to bear the cost of the books and stamps and the maintenance of its office and exhibition room.

If its premiums should have any fair value, then the Stamp Company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets—representing cash purchases of $99.00—shall be pasted in a book and produced at one time to entitle the holder to his premium. In this event, the company, if it actually contemplates making good its contracts, *is relying upon a lottery;* that is to say, the chances and advantages of its game for its expectations of profit or gain." (Italics ours.)

In the *Kraft* case (35 App. D. C., 253) the opinion begins with this statement:

> "Assuming that the statute does not apply in the case of bona fide co-operative associations, or of merchants making discounts or presenting actual articles directly to their customers * * *."

The writer of the opinion then proceeds to criticise the contract, upon the ground that it discloses that the Trading Stamp Company receives $3.50 for every thousand stamps and redeems such as may be presented, in goods or in cash, at $2 per thousand. The inapplicability of this criticism to the case at bar is demonstrated by the provision of our statute referred to at the commencement of this brief, requiring the redemption thereof in any number in cash for the full face value.

The record in the present case discloses no such a condition of extortion as that disclosed in either of the two cases referred to. If it be said that the intervention of a middleman and consequent profit to him is made possible by the plan, the answer is that it is made no more possible than in countless other business ventures which are held to be entirely legitimate, and that this furnishes no reason for the striking down of a practice such as is aimed at by this legislation. It might well be concluded, that if the extortion adverted to in these two cases were attempted to be practiced, it could be prevented by pertinent legislation. And as a broad, general principle, we repeat, as we have heretofore argued, that the possibility of indirect imposition in a business furnishes no excuse for the utter demolition of that

business, provided it is otherwise legitimate. The two cases referred to, having relation alone to independent concerns engaged as *a separate business in selling trading stamps,* may not be fairly cited as precedent to sustain legislation of a general character such as the Act of which we complain.

Having extended our argument to the present length, we cannot observe where we would serve a useful purpose or assist this Court by a discussion of the decisions either of this Court or those of other tribunals upon the general subject of the extent of the police power. It certainly will not profit to refer to them for the purpose of abstract quotation of general principles which are well recognized, and furnish no guidance save as applied to the particular facts in connection with which they are used.

Some comparatively recent decisions of this Court are relied upon with confidence by appellants, which in our view furnish no criterion to measure the merits of this controversy.

If, as in the *Noble* case (*Noble State Bank v. Haskell,* 219 U. S., 104), it was held to be within the power of a state to secure the safety of bank deposits, and to require the fund therefor to be provided by those who were privileged by the state to conduct the business of taking deposits, we fail to see any room for the application of the principle here.

If in *Central Lbr. Co. v. South Dakota,* 226 U. S., 157, it was found that the legislation in question was fairly designed to prevent the destruction of competition (which is a natural law, and proper to be upheld), there is no analogy between that case and this.

If in *Schmidinger v. Chicago,* 226 U. S., 578, an enactment regulating the size of loaves of bread was held to be valid, it was clearly because such regulation was well designed to prevent fraud and imposition in the selling of this staple.

And in *Quong Wing v. Kirkendall,* 223 U. S., 59, it was held to be within the power of a state to discriminate in favor of steam as against hand laundries. This must be allowed for sanitary as well as other reasons which are real and not fictitious. Nor, as was declared in this case, may the right to adopt the actual distinction which exists on account of sex as a basis for discriminatory legislation be longer doubted.

We will not continue at a greater length and effort to distinguish the multitude of cases from this Court which are referred to by appellants.

The principle of these cases nowhere parallels the principle which must determine this decision, because in each case there may be observed a real relation between the thing discriminated against and the public welfare.

We are earnest in our view that if this legisla-

tion is upheld merely because the imagination of its protagonists has been active enough to conjure up a possible or a pretended relation between it and the public welfare, we shall have no assurance that any barrier remains or that the will of a ruthless majority will not be unbridled altogether.

We are brought to this conviction because we feel that whenever a Legislature shall be found to give heed to the selfish demands of one class, and thus discriminate against any character of business theretofore presumed to be legitimate, no greater effort of the imagination will be required to discover this same relation.

We have not designed .throughout this brief to offer any plea for the abridgement of legislative discretion, but only to assert that at some point the Constitution intervenes to preserve natural rights. That point must be reached now if logically it is to be reached at all this side of tyranny. The sagest of jurists announced a principle which will remain until constitutions and fundamental rights are written out, which appears to us to have the clearest application here:

> "Hence we may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, whether made with or without our consent, if

they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty."

Blackstone's Com., Vol. I, p. 125.

Respectfully submitted,

FRANK T. WOLCOTT,
W. T. DOVELL,
Solicitors for Appellees.

TANNER, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, *v.* LITTLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

No. 224. Argued October 29, November 1, 2, 1915.—Decided March 6, 1916.

Rast v. *Van Deman & Lewis*, *ante*, p. 342, followed to effect that the State may regulate the use of, and impose license taxes on the privilege of using profit sharing coupons and trading stamps.

The statute of the State of Washington of 1907 imposing license taxes on the privilege of using profit sharing coupons and trading stamps is in its essential particulars similar to the statute of Florida sustained in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342: and, *held* that such statute was properly enacted in the exercise of the police power of the State in regard to matters subject to regulation, and that it is not unconstitutional under the Federal Constitution as interfering with or burdening interstate commerce, impairing the obligation of contracts, denying equal protection of the law, or depriving merchants of their property without due process of law.

208 Fed. Rep. 605.

THIS case was submitted with *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, and attacks the validity of a statute of the State of Washington of the same general import and purpose as the Florida statute passed on in that case, *Rast* v. *Van Deman & Lewis*, *ante*, p. 342.

The statute requires that every person, etc., who shall use or furnish to any other person, etc., to use in, with, or for the sale of any goods, etc., any stamps, etc., which shall entitle the purchaser receiving the same with such sale of goods, etc., to procure from any person, etc., any goods, etc., free of charge, or for less than the retail market price thereof, upon the production of any number of such stamps, etc., shall, before so furnishing, selling or using

the same, obtain a license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, etc., from which such furnishing or selling, or in which such using shall take place.

The statute fixes the license at $6,000, and there is a prohibition of the use of the stamps, etc., in any town, city or county other than that in which they are furnished or sold. Violation of the act is made a "gross misdemeanor."

The complainants are nineteen in number, counting partnerships as single individuals, and engaged in the business of hardware, cleaning and dyeing, grocery, soap, canned goods, meats, drugs, dry goods, boots and shoes, fuel, photography, laundry and wine. Complainants sue for all similarly situated.

Their allegations, condensed and narratively stated, are as follows: They carry on their respective businesses at Spokane, State of Washington, and advertise in various ways, which are enumerated, including the premium advertising system, so-called, and have at various times, for the purpose of increasing their general trade and volume of business, especially their cash trade, adopted and used a premium advertising system conducted as follows: with the sale of their goods and merchandise they each give to their cash customers stamps, tickets or coupons at the rate of one stamp for each cash purchase of a convenient unit amount, as one stamp for each 5, 10 or 25 cent cash purchase, as the case may be, which stamps or coupons entitle their customers to the choice of a certain cash discount or, free of charge, to certain articles of merchandise of their own selection, when presented in certain prescribed numbers for redemption to complainants who redeem their own stamps or certificates, or to a third party with whom other of the complainants have contracts, many of which are still in force, for the use of their pre-

mium advertising system, including the use of their trading stamps or coupons used in connection therewith, and the redemption thereof in merchandise.

Many of the complainants accept the coupons, at the cash value thereon printed, in payment or part payment of the cash retail price of the premium articles.

The stamps and coupons are redeemable in accordance with the terms of printed catalogues or premium lists. Booklets are distributed free among complainants' customers and describe the articles which may be secured by the stamps or coupons and state the number thereof required to obtain the same. The delivery of the required number of stamps or coupons set forth in the list is in full payment for the article specified and no money or other consideration is charged therefor.

There is no element of chance involved in the system. The value of each article is fixed as to cash and merchandise redemption and the right of every holder is secure. The articles are of sound value and durable manufacture and are open to inspection during business hours. The premiums are not regularly dealt in by many of the complainants but are used exclusively in connection with premium advertising.

A number of complainants have contracts based on the system running from one to five years for the use of their premium advertising system, including their trading stamps in connection therewith, which contracts are now in force and were in force at the passage of the act, and a large number of stamps are now in the hands of complainants and if they are prevented from disposing of them complainants will suffer great and irreparable loss.

A great many manufacturers of various lines of merchandise, for the purpose of advertising their businesses and increasing the volume of their sales, enclose in the packages of their merchandise coupons and other premium tokens which entitle the purchaser of such merchandise to

other articles of merchandise free of charge. The number of the manufacturers is given, their names and the articles which they manufacture.

Complainants have upon their shelves large quantities of merchandise in which premium tokens are packed, which upon their sale entitle purchasers to other articles in the manner described, and in such packages are tobacco and tobacco products, and the use of the coupons and tickets as described is authorized and rendered lawful by § 3394 of the Revised Statutes of the United States and the amendments of that section in 1897, July 24, c. 11, 30 Stat. 151, 206, and 1902, July 1, c. 1371, 32 Stat. 714, 715.

The adoption of the premium advertising system enables complainants to give a discount upon purchases of small as well as large amounts, one coupon or stamp being given with each 5, 10 or 25 cent cash purchase, or multiple thereof, as the case may be. And a larger discount in merchandise can be given than otherwise there could be because as a result of large purchases of the merchandise given in exchange for the tokens the articles are secured at much less than the regular retail price. By reason of the system complainants have been enabled at a moderate cost to greatly increase their businesses and profits and are benefited because their articles in the homes of their customers are a continual advertisement. And the businesses are lawful ones and not prejudicial to the public health, safety, morals or welfare.

The statute of Washington violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives complainants of their property without due process of law and of the equal protection of the laws (a) because it is not equal and uniform in operation, each of the complainants paying their taxes as do other merchants engaged in similar lines of business and who use other and various methods of advertising and

who are not required to pay a license tax of $6000. The statute is therefore arbitrary and discriminatory. (b) The tax is not upon the businesses of complainants but upon their incidents and is an unwarrantable interference with the method and manner of conducting the same, is arbitrary, oppressive, discriminatory, is in excess of profits and prohibitive, and, while in the guise of revenue will produce none. (c) It deprives complainants of their liberty and property without due process of law inasmuch as they cannot bestow a gift or give an order upon another merchant for a gift to a customer, which is the exercise of a natural right, without paying an onerous and excessive tax. (d) The penalties and fines are so drastic and excessive that they deter complainants from violating the act and testing its validity in a court of law. (e) The statute is in contravention of § 10, Article I, of the Constitution of the United States in that it impairs the obligations of contracts with and the right of complainants to contract with their customers to give trading stamps and coupons with the purchase of merchandise redeemable in merchandise heretofore given by them. It also impairs the obligations of contracts entered into by complainants with third parties for the use of the advertising system, including the use of the stamps and coupons and the redemption thereof in merchandise. (f) The statute is partial, unreasonable, oppressive, unequal, in restraint of trade and prohibitive of lawful business. (g) The statute conflicts with § 3394 of the Revised Statutes of the United States and the amendments thereof. (h) It is criminal, making a crime of acts the test of which is incapable of ascertainment, that is, it makes a crime of furnishing stamps or similar devices which are redeemable "for less than the retail market price thereof," the premium article having no definite or fixed retail market price. The statute is therefore void for indefiniteness and uncertainty; and such provision is besides prohibitive of the business

as the articles are not dealt in by complainants except in connection with the premium system. And further that the statute is void because it attempts to fix the price at which complainants shall sell their merchandise.

The prosecuting attorney of the county threatens to enforce the provisions of the statute, to bring numerous criminal prosecutions as well as civil suits to enforce the payment of the license, and if complainants are forced to discontinue their business as described they will suffer great and irreparable damage because they have expended large sums of money in advertising the premium system, which expenditures would be a total loss, they having large stocks of merchandise on hand in which are packed the premium tokens and which cannot be removed without practically destroying the packages and the value of the merchandise contained therein, and that therefore if not permitted to dispose of them complainants will lose a large amount of money.

Complainants have outstanding in the hands of customers a large amount of tokens, the result of transactions before the passage of the statute, and it will be necessary in order to keep faith with their customers for complainants to redeem such tokens in merchandise in the future from time to time as the necessary and requisite number of the same are presented for redemption. If they fail to do so they will lose many customers and a large amount of trade and suffer thereby great loss and injury.

Having no remedy at law, complainants pray an injunction, first temporary and then perpetual.

A temporary restraining order was issued, which the Attorney General and the prosecuting attorney of Spokane County separately made motions to quash, each appearing only for that purpose. The motions asserted exemption from suit of those officers in a Federal court because the suit was against them as officers of the State to prevent the enforcement of the criminal laws of the State and was

therefore a suit against the State in violation of the Eleventh Amendment to the Constitution of the United States.

Subsequently motions to dismiss were filed by them and also by the defendant Evenson, county treasurer of Spokane County. The grounds of the motions alleged were misjoinder of parties complainants and of defendants, improper union of causes of suit, insufficiency of the facts alleged to justify the relief prayed, the adequacy of a remedy at law, and the absence of jurisdiction over the persons of the defendants or of the subject-matter of the action.

The motion for an interlocutory injunction came before three judges. Rudkin, district judge, delivered the opinion and judgment ordering an injunction as prayed. 208 Fed. Rep. 605. This appeal was then taken.

Mr. Dallas V. Halverstadt and *Mr. Blackburn Esterline*, with whom *Mr. W. V. Tanner*, Attorney General of the State of Washington, was on the brief, for appellants:

Between 1888 and 1915, statutes prohibiting, restricting, or licensing on the payment of fees, the use of trading stamps, were passed by Alabama, Arkansas, California, Colorado, Florida, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, Indiana, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Hawaii. In 1873, Congress passed an Act making it a penal offense to engage in any gift enterprise in the District of Columbia, 17 Stat. 464, c. 148, which embraced the use of trading stamps, *Lansburgh* v. *District of Columbia*, 11 App. D. C. 512; *District of Columbia* v. *Kraft*, 35 App. D. C. 253; *In re Gregory*, 219 U. S. 210. By an express Act of Parliament the use of trading stamps is a crime in the Dominion of Canada. *Wilder* v. *Montreal*, 26 Rapp.

Jud. Quebec, 504, and note. This unanimity of the legislative mind refutes the argument that the use of trading stamps is only a legitimate and harmless system of advertising, and that the statute of Washington deprives the users of them of liberty and property without due process of law.

In 1913, the State of Washington, declared as the public policy of the State that the use of trading stamps should be restricted and regulated, Sess. Laws, 1913, p. 413, and the Supreme Court of the State sustained it in *State* v. *Pitney*, 79 Washington, 608, expressly overruling *Leonard* v. *Bassindale*, 46 Washington, 301, holding unconstitutional the previous act of 1905, p. 374.

Coincident with the arguments before this court in this case, the Supreme Court of Louisiana sustained the trading stamp statute of that State, *Louisiana* v. *Underwood*, La. Sup. C., October 8, 1915. See also on this subject article by Assistant Attorney-General Warren, 13, Col. Law Rev., April, 1913, p. 296; "Premiums in Retail Trade," by I. M. Rubinow, 13, Jour. Pol. Economy, Sept., 1905, No. 4, p. 574; "Cost of Distributing Groceries," by E. M. Patterson, Ph. D., Wharton School of Finance, Univ. Penna., 50, Annals Academy Pol. Science, No. 139, p. 74; "Fallacy of the Trading Stamp," by Arno Dosch, Pearson's Magazine, Aug., 1911; "Premium Giving," by Frank Farrington, in Store Management Complete, Byxbee Pub. Co., Chicago, 1911.

Many authorities sustain the propositions that the State may prohibit the use of trading stamps by virtue of the police power, and that the Washington Trading Stamp Act is not an arbitrary classification.

If the State possesses the power to tax for revenue, the extent of the exercise of the power is immaterial.

Mr. W. T. Dovell with whom *Mr. Frank T. Wolcott* was on the brief, for appellees:

The Act is prohibitive. *Murphy* v. *California*, 225 U. S. 623; *Rosenthal* v. *New York*, 226 U. S. 260.

To prohibit the conduct of the business is contrary to the law of the land. *Cotting* v. *Stock Yards Co.*, 183 U. S. 79; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Gulf, Colo. &c. Ry.* v. *Ellis*, 165 U. S. 150; *Halter* v. *Nebraska*, 205 U. S. 34; *Holden* v. *Hardy*, 169 U. S. 366; *Lawton* v. *Steele*, 152 U. S. 133; *Mugler* v. *Kansas*, 123 U. S. 623.

The prohibition does not fall within the police power because it tends to limit extravagance. In regard to sumptuary laws, see *Allnutt* v. *Inglis*, 12 East, 527; Cooley's Blackstone, Book I, p. 125; Cooley's Const. Lim. (7th ed.), p. 549; *Ex parte Dickey*, 144 California, 234; 2 Farrand's Records of the Fed. Conv. 344; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Humes* v. *Little Rock*, 138 Fed. Rep. 929; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *People* v. *Gillson*, 109 N. Y. 389; 17 N. E. Rep. 343; *People* v. *Steele*, 231 Illinois, 340; 83 N. E. Rep. 236; *People* v. *Zimmerman*, 92 N. Y. S. 497; *Pullman Co.* v. *Knott*, 35 Sup. Ct. Rep. 2; *Ex parte Quarg*, 149 California, 79; *Seattle* v. *Dencker*, 58 Washington, 501; *State* v. *Fire Creek Coal Co.*, 33 W. Va. 188; Stickney's State Control, ch. I, and see p. 100; Tiedeman's Pol. Pow., p. 154.

The Act is not brought within the police power because it may foster intermediate concerns. *Denver* v. *Frueauff*, 39 Colorado, 20; *Winston* v. *Beeson*, 135 N. Car. 271; *Commonwealth* v. *Gibson Co.*, 125 Kentucky, 440; *People* v. *Dycker*, 76 N. Y. S. 111; *People* v. *Zimmerman*, 92 N. Y. S. 497; *State* v. *Dalton*, 22 R. I. 77; *State* v. *Ramseyer*, 73 N. H. 31; *State* v. *Sperry & Hutchinson*, 110 Minnesota, 378.

The Act denies equal protection of the law because the attempted classification for the purpose of a license tax is purely arbitrary. Cases *supra* and see *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Winston* v. *Beeson*,

135 N. Car. 271; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Ex parte Drexel*, 147 California, 763; *Ex parte Hutchinson*, 137 Fed. Rep. 949; *Southern Ry.* v. *Greene*, 216 U. S. 400; *Sperry & Hutchinson* v. *Temple*, 137 Fed. Rep. 992; *State* v. *Loomis*, 115 Missouri, 307.

The practice of using premium stamps is legitimate as a method of advertising. The coupon system furnishes a peculiar and legitimate inducement for the return of a customer. Coöperation among merchants in the use of the premium system is lawful and the adjudicated cases have held the classification arbitrary. *Montgomery* v. *Kelly*, 142 Alabama, 552; *Commonwealth* v. *Gibson Co.*, 125 Kentucky, 440; 101 S. W. Rep. 385; *Hewin* v. *Atlanta*, 121 Georgia, 723; *Ex parte McKenna*, 126 California, 429; *O'Keeffe* v. *Somerville*, 190 Massachusetts, 110; *Van Deman & Lewis Co.* v. *Rast*, 214 Fed. Rep. 827.

If the business or practice is lawful, it may not be prohibited indirectly by a license tax. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560; Cooley on Taxation (3d ed.), pp. 260, 1140, 1143; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; Harvard Law Review, Vol. XXVI, p. 682; *Kehrer* v. *Stewart*, 197 U. S. 60; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *McCray* v. *United States*, 195 U. S. 27; *M'Culloch* v. *Maryland*, 4 Wheat. 316; 3 McQuillin on Mun. Corp., § 1002; *Post. Tel. Co.* v. *Charleston*, 153 U. S. 692; *Spencer* v. *Merchant*, 125 U. S. 345; *Union Pac. R. R.* v. *Peniston*, 18 Wall. 5; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Weston* v. *Charleston*, 2 Pet. 449; *Wiggins Ferry Co.* v. *St. Louis*, 107 U. S. 365.

Repeated attempts to enact such legislation offer no argument for its constitutionality. *Chaddock* v. *Day*, 75 Michigan, 527; *Marbury* v. *Madison*, 1 Cranch, 137.

The "Retail Market Price" provision in the Act renders it unconstitutional. Bishop on Stat. Crimes (2d ed.), § 41; *Brown* v. *State* (Wis.), 119 N. W. Rep. 338; *Buckles* v. *State*, 5 Oklahoma, 109; 113 Pac. Rep. 244; *Chicago &*

N. W. Ry. v. *Dey*, 35 Fed. Rep. 866; *Collins* v. *Kentucky*, 234 U. S. 634; *Cook* v. *State* (Ind.), 59 N. E. Rep. 489; *Int. Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Kilbourne* v. *State*, 84 Oh. St. 247; 2 Lewis' Suth. Stat. Cons. (2d ed.), § 520; *Louis. & Nash. R. R.* v. *Commonwealth*, 33 L. R. A. 209; *Matthews* v. *Murphy*, 23 Ky. Law Rep. 750; *Savage* v. *Wallace*, 165 Alabama, 572; *Tozer* v. *United States*, 52 Fed. Rep. 917.

The Act is invalid because its observance requires the removal of inserts. *Asbell* v. *Kansas*, 209 U. S. 251; *Bettman* v. *Warwick*, 108 Fed. Rep. 46; *Commonwealth* v. *Sherman Mfg. Co.*, 75 N. E. Rep. 71; *Felsenheld* v. *United States*, 186 U. S. 126; *Halter* v. *Nebraska*, 205 U. S. 34; *M'Culloch* v. *Maryland*, 4 Wheat. 316; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Mo., Kan. & Tex. Ry.* v. *Haber*, 169 U. S. 613; *Mugler* v. *Kansas*, 123 U. S. 623; *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *People* v. *Van De Carr*, 178 N. Y. 425; *People* v. *Zimmerman*, 92 N. Y. S. 497; *Savage* v. *Jones*, 225 U. S. 501; *Second Employers' Liability Cases*, 223 U. S. 1; *Sinnot* v. *Mobile*, 22 How. 227; *Smith* v. *Alabama*, 124 U. S. 465; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 426.

Excessive penalty renders Act unconstitutional. *Bonnett* v. *Vallier* (Wis.), 116 N. W. Rep. 885; *Cons. Gas Co.* v. *New York*, 157 Fed. Rep. 849; *Cotting* v. *Stock Yards*, 183 U. S. 79; *Grenada Co.* v. *Mississippi*, 217 U. S. 433; *Mo. Pac. Ry.* v. *Tucker*, 230 U. S. 340; *Portland Ry.* v. *Portland*, 201 Fed. Rep. 119; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *State* v. *Crawford*, 74 Washington, 248; 133 Pac. Rep. 590; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 111; *Ex parte Young*, 209 U. S. 123.

The cases of *Dist. of Col.* v. *Kraft*, 35 App. D. C. 253 and *Lansburgh* v. *Dist. of Col.*, 11 App. D. C. 512, can be distinguished.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The court ruled against the motions to dismiss, and concurring with the ruling as far as it retained jurisdiction of the suits and the persons of the defendants, we pass to the consideration of the validity of the statute of the State. Of that it was said: "The court is fully satisfied from a bare inspection of the act without more and without considering the affidavits on file, that it is and was intended to be prohibitive of the business methods against which it is directed. It is plainly manifest that no merchant could afford to pay the sum of $6,000 annually for the mere privilege of giving away trading stamps or allowing discount on his cash sales. But if this were the only objection to the act it may be that the courts would be powerless to enjoin its execution. The power of taxation rests upon necessity and is inherent in every independent State. It is as extensive as the range of subjects over which the government extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy. *Post. Tel. Co.* v. *Charleston*, 153 U. S. 692, 699; *McCray* v. *United States*, 195 U. S. 27; *Kehrer* v. *Stewart*, 197 U. S. 60."

The charge of discrimination against the statute was decided to be a factor as to its validity. The use of trading stamps and other similar devices was regarded as a legitimate system of advertising and that to distinguish it from other systems of advertising was a violation of the equality clause of the Federal Constitution. And it was said: "As well might the legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling who do not so advertise."

In this conclusion we think, for the reasons expressed in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, just decided, that the court erred. We have been at pains to summarize the bill in this case to show its similitude to that.

The coupons in this case, in compliance with the law of the State of Washington (Laws of 1907, p. 742), must be redeemed in cash if demanded by the purchaser; otherwise in articles of merchandise selected by him. The redemption of the coupons in some instances is directly by the merchant issuing them; in others, it is alleged, by "a third party, with whom said complainants have a contract for the use of their trading stamps or coupons used in connection therewith and the redemption thereof in merchandise." These differences, however, do not affect the principle announced in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342. Whether the coupons are prepared by the issuing merchant or prepared by another, whether they be redeemed by him or by another, is but a phase of the system, not affecting its essential character. And we may say here, as we said in *Rast* v. *Van Deman & Lewis*, that we are not concerned with consideration of a business in which coupons, etc., are issued or used and not redeemed in merchandise, that is, where they are used as a rebate upon the price of the article or a discount upon purchases, nor with the legality of a statute which should regulate or prevent such use of the coupons disassociated from other uses of them. Complainants contend for a broad use and assert that there cannot legally be any limitation of their methods of redemption, which they comprehensively denominate the "premium system."

The opinion in *Rast* v. *Van Deman & Lewis* is, therefore, decisive of the contentions in this case. We said there that there were manifest differences between the "premium system" of advertising and the other methods enumerated and that those differences justified a difference in measures. And this is justified not only by the wide

discretion which may be exercised in legislation but by a rigid principle of classification. Classification is not different in law than in other departments of knowledge. "It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those particulars.'" *Billings* v. *Illinois*, 188 U. S. 97, 102. Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered. It may not make the distinction adverted to but it may make others the appropriateness of which, considered logically, may be challenged, for instance: between sales of stock upon margin or for immediate or future delivery (*Otis* v. *Parker*, 187 U. S. 606); between acts directed against a regularly established dealer and one not so established (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157); in an inspection law, between coal mines where more than five men are employed and coal mines where that or a lesser number are employed (*St. Louis Cons. Coal Co.* v. *Illinois*, 185 U. S. 203); and a like distinction in a workmen's compensation law (*Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571); between a combination of purchasers and a combination of laborers (*International Harvester Co.* v. *Missouri*, 234 U. S. 199); between residents and non-residents (*Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364); in a law requiring railroads to heat passenger coaches, between roads of 50 miles and

roads of that length or less (*N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628; see also *Dow* v. *Beidleman*, 125 U. S. 680; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688); between theatres according to the price of admission (*Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61); between land owners as to liability for permitting certain noxious grasses to go to seed on the lands (*Missouri, Kansas & Texas Ry.* v. *May*, 194 U. S. 267); between businesses, in the solicitation of patronage on railroad trains and at depots (*Williams* v. *Arkansas*, 217 U. S. 79); and a distinction based on the evidence of the qualifications of physicians (*Watson* v. *Maryland*, 218 U. S. 173, 179).

Those were instances (and others might be cited) of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the regulation and restriction was in the interest of the public welfare. Those classifications were sustained as legal, being within the power of the legislature over the subject-matter, and having proper bases of community.

But the classification which was sustained in *St. Louis Coal Co.* v. *Illinois*, 185 U. S. 203, was condemned in *Truax* v. *Raich*, 239 U. S. 33. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80% qualified electors or native born citizens of the United States or of some subdivision of such. The statute was held void because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times. Let us apply the test to the case at bar. Let it be granted that the "premium system" is a method of advertising, can there not be differences in advertising

which may be subject to differences in legislation? Can there not be advertising at places or at times or in kind or effect subversive of public order or convenience? *Fifth Ave. Coach Co.* v. *New York*, 221 U. S. 467; *Commonwealth* v. *McCafferty*, 145 Massachusetts, 384. However, a decisive answer to the questions, need not be given, for we have said, in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, that the "premium system" is not one of advertising merely. It has other, and, it may be, deleterious, consequences. It does not terminate with the bringing together of seller and buyer, the profit of one and the desire of the other satisfied, the article bought and its price being equivalents. It is not so limited in purpose or effect. It has ulterior purpose, and how it has developed complainants vividly represent by their averments. It appears that companies are formed, called trading stamp companies,[1] which extend and facilitate the schemes, making a seller of merchandise their agent for the distribution of stamps to be redeemed by them or other merchants, the profit of all being secured through the retail purchaser who has been brought under the attraction of the system. There must, therefore, be something more in it than the giving of discounts, something more than the mere laudation of wares. If companies—evolved from the system, as counsel say in justification of them—are able to reap a profit from it, it may well be thought there is something in it which is masked from the common eye and that the purchaser at retail is made to believe that he can get more out of the fund than he has put into it, something of value which is not offset in the prices or quality of the articles which he buys. It is certain that the prices he pays make the

[1] *Lansburgh* v. *District of Columbia*, 11 App. D. C. 512; *Attorney General* v. *Sperry & Hutchinson Co.*, 110 Minnesota, 378; *Louisiana* v. *C. A. Underwood or Southern Merchandise Exchange*, decided October 18, 1915, by the Supreme Court of Louisiana; *Hewin* v. *Atlanta*, 121 Georgia, 723.

efficiency of the system and the fund, if we may individualize it, out of which the cost of the instruments and agents of the system must be defrayed and the profit to all concerned paid. The system, therefore, has features different from the ordinary transactions of trade which have their impulse, as we have said, in immediate and definite desires having definite and measurable results. There may be in them at times reckless buying, but it is not provoked or systematized by the seller.

Complainants charge that the tax of the statute is not upon the business but upon its incidents. The separation is artificial. It is the incidents which give character to the business, affecting it with evil, it was thought, provoking therefore against it the power of the State and taking away from it the immunity it else might have.

It is unimportant what the incidents may be called, whether a method of advertising, discount giving or profit sharing. Their significance is not in their designations but in their influence upon the public welfare. And of this the judgment of the legislature must prevail, though it be controverted and opposed by arguments of strength. Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature. *McLean* v. *Arkansas*, 211 U. S. 539. Such belief

has many examples in state legislation and, we have seen, it has persisted against adverse judicial opinion. If it may be said to be a judgment from experience as against a judgment from speculation, certainly, from its generality, it cannot be declared to be made in mere wantonness. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204–205.

Discrimination aside, the power to enact the legislation we need not discuss, but may refer to the opinion in *Rast* v. *Van Deman & Lewis*. Of course, it is in the exercise of the police power of the State. We will not here define it or its limitations. As was said by Mr. Justice Brown, in *Camfield* v. *United States*, 167 U. S. 518, 524, citing *Rideout* v. *Knox*, 148 Massachusetts, 368, "The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests."

In the view that the license is prohibitive we may concur, and concede that such is the effect given it by the Supreme Court of the State in *Pitney* v. *Washington*, *post*, p. 387, one of the cases submitted with this one. And we think it was competent for the State to give it that effect. The cases cited by Judge Rudkin and those cited in the opinion in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, so established.

For answer to the other contentions which we consider material to notice we refer to that case.

Decree reversed and case remanded with directions to dismiss the bill.